On the Ethical Desirability of the ‘Wrongful Life’ Delictual Action

by

Gaenor Jayne Michel

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Supervisor: Dr Susan Hall

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Declaration

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Abstract

The wrongful life action is a legal remedy used by a person who is born into a disabled state as a result of the negligence of a medical practitioner, and who would not have been born at all but for the negligence of that medical practitioner, to claim damages. The action, however, is generally argued to be premised upon an un-actionable injury because the wrongful life plaintiff is argued to have suffered no harm. The implicit moral argument therein, moreover, is that allowing a wrongful life claim would be analogous to holding a rescuer liable for injuries that he caused to an endangered person. In this thesis, I propose that this argument rests upon the application of a deeply problematic conception of harm which, upon closer inspection, does not accord with our intuitions regarding harmfulness. I will attempt to show that what is harmful about harm is not that it objectively renders a person worse off, but rather that it causes a subjective clash with, or usurping of, that person's will. I also argue that harm can be retroactive in nature, in that there can be a time gap between the harmful act or event and the harmful felt effects of that act or event. In this way, the harm paradox within the wrongful life action is resolved and, as a consequence, the 'unactionable injury' argument against the wrongful life action fails. In this thesis, I also consider certain policy arguments against the wrongful life action, and I argue that they also fail. In the first place, I consider the argument that the action unfairly discriminates against disabled persons by perpetuating their social inequality. I try to show, however, that the compensation element of the wrongful life action can be viewed as a form of positive accommodation which affirms the worth and dignity of disabled persons by recognising their difference and particularity. In the second place, I consider the argument that permitting the action would lead to a slippery slope whereby children, who feel harmed by coming into existence, would use the action to claim against their parents, and that this would conflict with the parents' moral right to procreative autonomy. I try to show, however, that procreative autonomy should be limited in any event because it is impermissible to impose harm onto unconsenting individuals purely for the sake of bestowing benefits. This implies that, from a moral standpoint, we ought to take the claims of children who feel harmed by coming into existence seriously.

Opsomming

Die aksie weens onregmatige lewe (“wrongful life”) is ’n regsmiddel vir gebruik deur ’n gestremd-gebore persoon wat glad nie gebore sou gewees het as dit nie vir die nalatigheid van ’n mediese praktisyn was nie, om skadevergoeding teen sodanige mediese praktisyn te eis. Daar word egter algemeen aangevoer dat die aksie op die premis van ’n onafdwingbare besering berus, deurdat daar betoog word dat die eiser in die onregmatigelewe-aksie geen skade gely het nie. Die implisiete morele betoog hierin is verder dat die toestaan van ’n eis weens onregmatige lewe soortgelyk sou wees daaraan om ’n redder aanspreeklik te hou vir die beserings wat hy of sy aan ’n bedreigde persoon sou aangerig het. In hierdie proefskrif doen ek aan die hand dat hierdie betoog berus op die toepassing van ’n diepliggende problematiese opvatting van skade wat, by nadere ondersoek, nie met ons onmiddellike intuïsies oor skadelikheid ooreenstem nie. Ek toon aan dat wat skadelik aan skade is, nie objektief-gewys is dat dit ’n persoon slegter daaraan toe maak nie, maar eerder subjektief-gewys ’n botsing met, of wederregtelike toe-eiening van, daardie persoon se wil veroorsaak. Ek voer verder aan dat skade terugwerkend van aard kan wees, deurdat daar ’n tydsgaping tussen die skadelike daad of gebeurtenis en die skadelike gevolge gevoel weens daardie daad of gebeurtenis kan wees. Só word die skade-paradoks in die aksie weens onregmatige lewe opgelos, en gevolglik misluk die “onafdwingbarebesering”-betoog teen die onregmatigelewe-aksie. In hierdie proefskrif oorweeg ek verder bepaalde beleidsbetoë teen die onregmatigelewe-aksie, en ek voer aan dat ook hulle misluk. Eerstens oorweeg ek die betoog dat die aksie ongeregmatig teen gestremde persone diskrimineer deur hul sosiale ongelykheid te laat voortduur. Ek wil egter aantoon dat die vergoedingselement van die aksie weens onregmatige lewe gesien kan word as ’n vorm van positiewe bystand, wat die waarde en waardigheid van gestremde persone bevestig deur hul verskille en besondersheid te erken. Tweedens oorweeg ek die betoog dat die toelating van die aksie ’n gevaarlike weg kan oopstel deurdat kinders, wat benadeel voel deur hul ontstaan, die aksie sou kon gebruik om teen hul ouers te eis, wat in stryd met die ouers se morele reg op voortplantingsoutonomie is. Ek probeer egter aantoon dat voortplantingsoutonomie in elk geval beperk behoort te word omdat dit ontoelaatbaar is om skade aan nie-toestemmende individue toe te meet bloot ter wille van voordeleverlening. Dit impliseer dat ons, vanuit ’n morele oogpunt, die eise van kinders wat vanweë hul ontstaan benadeel voel, ernstig moet opneem.

Contents

Introduction

The wrongful life action is a legal remedy which is used by a person who is born into a disabled state or condition due to the negligence of a medical practitioner, and who would not have been born at all but for the negligence of that medical practitioner, to claim damages. More specifically, the plaintiff in a wrongful life action claims that he or she would have been aborted had the medical practitioner informed his or her parent(s) of the potential disability, and that, therefore, the medical practitioner is liable for the fact that the plaintiff has been born and now spends his or her life in a disabled state or condition, which could have been avoided.

The wrongful life action, however, is largely argued to be premised upon an un-actionable injury. The argument runs as follows. An actionable injury only arises if a person has been harmed. A person has only been harmed if he or she has been rendered worse off by the conduct of another. A wrongful life plaintiff, however, has not been rendered worse off by being born disabled as the result of the conduct of the negligent medical practitioner. This is because, had the medical practitioner acted otherwise, the wrongful life plaintiff would have been aborted and would therefore not have existed, and because a disabled existence is not worse than non-existence,[1] the wrongful life plaintiff has not been harmed by the conduct of the medical practitioner but, rather, he or she has been benefited.

Consider the following hypothetical case study. A couple discover that they are pregnant. They decide to undergo amniocentesis to screen for any disabilities in their baby on the presupposition that they will abort should any disability be present. The couple get the procedure done. Three days later, their medical practitioner informs them that he has received their amniocentesis results and that, based on his observations, there is no risk of any disability present in their baby. The pregnant couple are overjoyed and they continue with their pregnancy. A few months later their baby is born and he is named Jim. Jim is a relatively easy baby for the first two months. During the third month, however, Jim begins to cry incessantly at night and appears to be going slightly blue in the face during these crying fits. The couple end

[1] Or cannot be meaningfully compared to a disabled existence.

up rushing him to hospital one night. At the hospital, Jim is put through a variety of tests. After hours of waiting, the couple is informed by the attending physician that Jim suffers from a severe form of cystic fibrosis and that he has an under-developed left lung. This is why Jim cries at night when he is lying down and why he goes slightly blue, as he is unable to breathe properly and comfortably. The parents ask the attending physician what has caused this and what cure there is for such a disease. They are informed, however, that it is genetic and that there is no cure. They are further informed that Jim's life to follow will be accompanied by serious breathing difficulties and pain. The parents are devastated with this prognosis because they had specifically tested for cystic fibrosis in the amniocentesis. It turns out, however, that the medical practitioner who conducted their amniocentesis had negligently misinterpreted the results. They consider whether to sue him, but decide that if they proceed with this route they would have to acknowledge that Jim's life is not worth living, and he may then believe that they do not love him. They ultimately decide that the best course of action is to love Jim as he is, with his medical flaws, and to make his life as comfortable as they can, so that he experiences the least suffering possible.

Fast forward some sixteen years later. Jim's cystic fibrosis has progressed to the point that he has become physically weak and virtually immobile. His disability has also led to other complications which cause him pain. Jim feels that his disability has really hindered him in his life and has prevented him from partaking in many activities. In a few years time, he will have to spend the rest of his life wheelchair-bound with a specialised medical ventilator. Jim is really down about this. Jim also knows that the specialised medical ventilator is extremely expensive. As a result, Jim decides to institute a wrongful life claim against the medical practitioner who conducted the amniocentesis for his parents. Jim believes that the medical practitioner is to blame for the fact that his life is accompanied by physical, emotional and now, as the last straw, economic suffering.

Jim consults with an attorney. The attorney, however, advises him that courts are reluctant to grant wrongful life claims because they are thought to be unactionable injuries. More specifically, he is advised that the legal argument which will be levied against him is that the medical practitioner's conduct, in negligently conducting the

amniocentesis, did not cause Jim any harm. This is because had the medical practitioner acted otherwise (i.e. not negligently), Jim would have been aborted and would therefore not have existed, and because a disabled existence is better than no existence, Jim has not suffered any harm and therefore lacks a basis for a legal claim.

The moral argument inherent within this legal argument, moreover, is that allowing a claim for recovery in this context would be analogous to holding a rescuer liable for injuries that he caused to an endangered person whilst rescuing him or her. Suppose, for instance, that a rescuer sees an endangered person drowning in a pool. The rescuer swims out to save the endangered person but upon pulling him or her out of the water the rescuer inadvertently breaks the endangered person's arm (Feinberg 1992: 27). Can we say that the endangered person has been harmed by the rescuer and should he or she have a claim against the rescuer for the broken arm? It seems not, as the burden of the broken arm seems to be offset by the overriding benefit of being saved. So too, it is argued, the burden of a disabled existence suffered by a wrongful life plaintiff, or by Jim in the above scenario, is offset by the benefit in coming to exist, and that there is therefore no harm in the relevant full sense which is suffered. In summary then, the argument is that the wrongful life action cannot be justified on ethical grounds because it provides a mechanism for compensating a person who has not been harmed.

In this thesis, I subject the abovementioned argument to closer scrutiny. In doing so, I will need to address two prominent questions implicit therein. Firstly, is a wrongful life plaintiff, like Jim, harmed by the conduct of a medical practitioner who negligently facilitates his or her coming into existence into a disabled state? Secondly, is disability necessarily a harmful state or condition to be in? It will become clear that this second research question is implicit within the first question.

I will argue that the first question can be answered in the affirmative. More specifically, I will propose that the charge that the wrongful life plaintiff has not suffered harm rests upon the application of a deeply problematic conception of harm which, upon closer inspection and analysis, does not actually accord with our intuitions surrounding harmfulness. That is, and as I will attempt to show, harm is not

about objectively rendering a person worse off. Harm is rather about subjective clashes of the will and forced experiential states. This has the effect that we can only harm others if they subjectively feel harmed and, as I will argue, this makes more sense when we consider certain instances of 'non-harm', such as elected death, painful contact sport and certain forms of sadism and masochism ("S&M").

Based on this, I will argue that if we follow a subjective will-based approach to harm, which I submit accords with our intuitions regarding harmfulness, we can conclude that the wrongful life plaintiff was harmed. I will also argue that harm can be retroactive in nature, in that there can be a time gap between the harmful act or event and the harmful felt effects of that act or event. By conceptualising harm in this way, we can conclude that the wrongful life plaintiff, if he or she subjectively takes his or her disability to be harmful, has suffered harm by being forced into a disabled existence which clashes with his or her will, irrespective of the fact that at the time that the medical practitioner acts the wrongful life plaintiff is not a person with a fully fledged will, but rather a foetus in utero. This does, however, imply that only disabled persons who can later communicate their wills will be able to show that they are harmed. In other words, only disabled persons who have the ability to *express* a rejection of their disabled existence will be able to show that they have been harmed and thereby claim using the wrongful life action. I will, however, try to show that this is a necessary limitation in that it protects the integrity of the wrongful life action, and saves it from the charge that it presupposes that *all* disabled persons have miserable lives.

On the assumption that harm has to do with a subjective frustration of the will, I will then proceed to answer the second question, that is, whether disability is necessarily a harmful state or condition. This question arises because it is implicit within my first research question. More particularly, the causal question of whether a wrongful life plaintiff can be *harmed* by a medical practitioner who causes him or her to be born disabled instead of not being born at all, presupposes that *being in a disabled state* is harmful. Naturally, a moral patient cannot be harmed by the conduct of a moral agent whose conduct has the effect that the moral patient moves into a particular state, if that state is not also harmful within itself. My answer to this implicit question, however, is inherently problematised by the fact that I argue for a subjective will-

based account of harm. That is, if harm is about subjective clashes of the will then we can probably never definitively say that disability as such is a harmful condition, as it would only be harmful in particular cases (where it does in fact clash with a particular person's will) and therefore never necessarily harmful in all cases. I also acknowledge, in further amplification of this, that there is great variation in disability and also that disability is viewed very differently depending upon whether one adopts a medical understanding or a social understanding of disability. There is also the issue that disabled people tend to view disability very differently to the way that most able-bodied people do. In light of this, my answer to the question on whether disability is a harmful condition is meant to be explorative rather than authoritative, so that I do not make a faulty generalisation. In other words, what I will provide is an overview of the ways in which disability *might* be conceptualised as harmful, which is not to say that it is necessarily harmful. I will provide this overview by analysing disability with regard to three common experiences often thought to be associated with disability, namely; suffering, a lack of or decreased access to qualia (or ways in which the world is experienced by virtue of the possession of certain senses) and a lack of autonomy or personal agency.[2]

Based on the aforegoing, I will attempt to show that a wrongful life plaintiff can be said to be harmed by being born into a disabled state if he or she takes his or her disability to be a harmful condition. The implication is that wrongful life actions become ethically justifiable, in that they provide a necessary mechanism for compensating persons who have been harmed.

In this thesis, I also consider two of the most prevalent policy arguments against the wrongful life action. Although these arguments can be viewed as further ethical objections to the wrongful life action (like the 'no harm' objection), I have framed them specifically as policy arguments, separate to the main argument in this thesis.

[2] Such experiences are largely encompassed within the more general 'poor quality of life' claim against disability. In other words, it is often assumed that disabled persons have a poorer quality of life than able-bodied persons. Within this 'poor quality of life' claim, however, are a host of implicit claims for why, precisely, disabled life is poorer in quality than able-bodied life. The most prevalent of these implicit claims are that a disabled life comes with an experience of suffering, that a disabled life comes with an experience of decreased autonomy and personal agency, and that a disabled life involves *a lack of or decreased access to* the common ways in which able-bodied persons experience the world by virtue of the possession of certain senses such as sight, touch and so on, which has certain disadvantages.

The reason is twofold. Firstly, the ‘no harm’ objection to the wrongful life action is the most analytically and logically perplexing argument against the action. In the legal literature, it is often noted to be the paramount objection to the action. This is because it is very near impossible to conceptualise a wrongful life plaintiff’s harm from within the traditional ‘harm-causing-conduct’ paradigm of civil liability without running into logical problems. Because of this, arguments that are developed from the perspective of a policy response to the wrongful life action will never gain traction, unless the ‘main’ problem within the wrongful life action is addressed. My second reason for framing the debate in this way is that it accords with the logical flow of a civil liability analysis of any delictual or tort-law system. In other words, the analysis always begins with the question of harm, and then moves towards questions of causation and negligence, and thereafter to questions of policy (which would involve questions surrounding fairness, practical effects of and possible slippery slopes in relation to assigning liability).

In the first place, I consider the policy argument that the action unfairly discriminates against disabled persons by perpetuating their social inequality. I try to show, however, that the compensation element of the wrongful life action can be viewed as a form of positive accommodation which affirms the worth and dignity of disabled persons by recognising their difference and particularity. In the second place, I consider the policy argument that permitting the action would lead to a slippery slope whereby children, who feel harmed by coming into existence, would use the action to claim against their parents, and that this would conflict with the parents’ moral right to procreative autonomy. I try to show, however, that procreative autonomy should be limited in any event because it is impermissible to impose harm onto unconsenting individuals purely for the sake of bestowing benefits. This implies that, from a moral standpoint, we should take the claims of children who feel harmed by coming into existence seriously.

Ultimately, this thesis will therefore try to show two things. In the first place, it will show that the wrongful life plaintiff can be harmed by being born disabled if he or she experiences his or her disability as harmful, and that the wrongful life action is therefore necessary to vindicate that harm. As a consequence, the ‘unactionable injury’ argument against the wrongful life action fails. In the second place, it will show

that the policy arguments against the wrongful life action also fail. Therefore, the wrongful life action is ethically desirable and should therefore be permitted.

In order to make the aforementioned claims, this thesis will proceed through four chapters. Chapter 1 will begin by elucidating the legal nature of the wrongful life action as well as the legal context in which wrongful life claims arise. In this chapter, I will explain the legal requirements for the wrongful life action and distinguish it from the wrongful conception and wrongful birth actions, with which the wrongful life action is often confused. I will then also contrast it to pre-natal injury claims, so as to further distil the unique character of the wrongful life action as an action based on conduct which *facilitates the coming into existence with a disability*, rather than conduct which *causes a disability* to an individual who would otherwise not have been born with one. Following this, I will proceed to examine how the legal community has responded to the wrongful life action, from the perspective of legislatures and judges of different countries or jurisdictions. This chapter will ultimately serve to introduce the legal nature and reception of the wrongful life action, as well as to distil the characteristics of the action which have proved to be problematic from a legal standpoint.

Chapter 2 will then proceed to examine the harm paradox within wrongful life actions. In the chapter, I will examine the specific moral account of harm which underlies the legal account of harm adopted in delictual law,[3] namely, the counterfactual comparative account of harm. I will proceed to show that this account of harm fails to correctly describe harm by examining three contexts in which it has been shown that the counterfactual comparative account of harm does not accord with our intuitions surrounding harmfulness. These are, firstly, the context of pre-emptive harms; secondly, omissions and failures to benefit; and finally, the context of future persons who would not exist but for our harmful actions (encapsulated under the non-identity problem). I then move over to consider some solutions that have been given in these three contexts by those who follow a counterfactual comparative

[3] Delictual law is the branch of the law that deals with civil harms and the compensation required to correct those civil harms. More succinctly, delictual law "determines when and how an actor must consider the well-being of others when deciding how to act" (Gerhart P,M, 2010 *Tort Law and Social Morality*: 5) If an actor is not appropriately other-regarding in his or her act, he or she may be required to compensate a person who suffers harm as a result of his or her act.

approach to harm, as well as arguments for why these attempts have failed. I will ultimately conclude that the counterfactual comparative account fails to explain what is intuitively harmful about harm.

Following this, I will proceed to examine two non-comparative accounts of harm, being the account of Harman and the account of Shiffrin. I will argue that these non-comparative accounts of harm are able to get around at least two of the problems which comparative accounts run into in the abovementioned three problematic contexts and that a non-comparative approach to harm therefore best accommodates our intuitions regarding harmfulness. I specifically argue, moreover, that Shiffrin's account of harm is the most extensionally adequate account of harm and endorse her view that harm has to do with a subjective clashing of the will and forced experiential states. In support of this, I will try to show that her account can accommodate the intuition that death is only harmful when it is unelected in the same way that assault is only harmful if the victim subjectively feels that it is harmful. The examples of painful contact sport and instances of sadism and masochism ("S&M") serve as good illustrations of this latter point. On the assumption, then, that harm has to do with the subjective clashing of the will and forced experiential states rather than the objective worsening of a prior position, I ultimately argue that the wrongful life plaintiff, who objectively may very well be in a better position than he or she would have been in, can be harmed. I will also argue that harm can be retroactive so that the wrongful life plaintiff can suffer the subjective effects of harm after the harming event has occurred, which avoids the charge that is often levied against Shiffrin's account of harm in a wrongful life context, which is that at the time the negligent medical practitioner acts the child is not yet a person with a will and therefore does not have the capacity to be harmed.

Chapter 3 will then move to address the second research question, that is, whether disability is a harmful condition. In order to answer this, I begin by looking at two very different models of disability, being the traditional medical model and the social model, and analyse how these different models interact with the following questions: firstly, whether disabled persons necessarily suffer; secondly, whether disabled persons lack or have a reduced access to important qualia and thirdly, whether disabled persons lack important aspects of autonomy and personal agency which

are necessary for a meaningful life. In summary, I will conclude that whether a particular disability might be considered harmful would depend upon the unique nature of the impairment in question, the social context in which the disabled person finds him or herself as well as, and most importantly, the particular disabled person's subjective experience of his or her disabled life. This approach also follows naturally from the account of harm which I endorse, being a subjective account of harm.

The last chapter, Chapter 4, will then turn to examine two policy arguments against the wrongful life action. Here I will consider, firstly, the argument that adopting the wrongful life action would unfairly discriminate against disabled persons in that it would amount to a state-endorsed message that disabled lives are not worthwhile and that this would perpetuate their social discrimination and inequality. I will try to show, however, that the wrongful life action, on the contrary, can be seen as a form of positive accommodation, which has the ability to send a message that disabled persons are worthy of respect and concern and that their difference and particularity should be respected and promoted. I will then, secondly, turn to consider the argument that the wrongful life action may lead to a slippery slope whereby children will use the action against their parents, which would run contrary to the right to procreative autonomy. In response, I will try to show that it would not be ethically desirable to exclude the culpability of parents from the ambit of the wrongful life action. This is because it is *impermissible* to impose harm upon an unconsenting individual purely for the sake of bestowing benefits, and the potential culpability of parents cannot, therefore, be 'neutralised' by their act of bestowing the benefit of existence onto their children. The implication is that, from a moral standpoint, the wrongful life action should therefore be available to children against their parents if they feel that they have been brought into a harmful existence. This should not, however, be construed as an argument in favour of anti-natalism for anti-natalism presupposes that coming into existence is *always* harmful. Based on the account of harm forwarded in this thesis, being a subjective account of harm, coming into existence is only harmful if and only if the moral patient feels harmed and, therefore, coming into existence is not always or necessarily harmful.

Chapter 1: The legal nature and reception of the wrongful life action

1.1. Introductory remarks

Recent developments in biological science and medical technology have made it possible for medical practitioners to identify (through, for example, amniocentesis) and predict (through, for example, genetic counselling and testing), defects in foetuses and potential children. These developments, however, have also placed a concomitant responsibility on members of the medical profession to make these identifications and predictions accurately, or at least in accordance with the legal duty of care which is required of all members of their profession. Sometimes, medical practitioners make mistakes in their identifications and predictions of foetal defects. The legal consequence of these mistakes is that medical practitioners can be held liable and ordered to recompense persons who have suffered harm as a result of their mistakes. The biological consequence of these mistakes, however, is often the conception or birth of a disabled child "who, if knowledge of its conditions had been available, [might] have been aborted or perhaps not even conceived" (Hanson 1996: 1).

As will become clear from the discussion below, assigning liability to a medical practitioner who made a negligent mistake and ordering him or her to compensate (the legal consequence) a now existent disabled child who would not have been born but for the negligent conduct of a medical practitioner (the biological consequence) is not an unproblematic exercise. This is because the exercise naturally conjures up a host of moral and logical complexities which the law is seemingly unable to accommodate. More particularly, as soon as a plaintiff's natural or biological alternative position is non-existence, proving legal harm becomes an overwhelming hurdle. At the same time, however, it also seems clear that in making a negligent mistake, the medical practitioner has done something wrong and should therefore be held accountable. Because of this tension, different countries or jurisdictions have attempted to balance the legal and biological consequences in different ways. Some countries, for instance, have not allowed any damage recovery in this area and in this sense they 'fly in the face' of the legal consequence. Other jurisdictions have

attempted a delicate balance by limiting damage recovery to narrowly-defined plaintiffs or to narrowly-defined forms of damages, as we will see below.

My aim, in this first chapter of the thesis, is to flesh out the different ways in which different countries or jurisdictions have attempted to balance the legal and biological consequences from within a civil liability system. The purpose of this is twofold. On the one hand, it will serve to distil the metaphysical complexities inherent in assigning not only legal liability but also moral accountability in cases of negligent medical practitioners who make mistakes which carry with them the birth or conception of a disabled child, and how different jurisdictions have responded to or accommodated this. On the other hand, the discussion will also serve as an illustration of the specific types of legal redress which are generally available in any civil liability system, and the intricacies of each,, in order to distil one particularly controversial type of legal redress, namely, the wrongful life action, with which I will be primarily focussed for the remainder of the thesis.

1.2. Potential available legal recourse

As mentioned above, liability will sometimes attach to the conduct of a medical practitioner when his or her conduct does not measure up to the required standard of care expected of him or her (the legal consequence). There are two general strands of legal recourse available here, within a general civil liability system, one based on breach of contract, the other based on the principles of delictual law.

Under breach of contract, the plaintiff will need to prove that the medical practitioner breached his or her duty of care owed to the plaintiff (here the patient) by virtue of the contract concluded between them. Importantly, this remedy will only be available to a parent of a child born with a disability and never to the child itself. This is because only a legal person can be the bearer of contractual rights and at the time at which the negligent conduct occurred (when the child was in utero or merely a potentiality in the minds of the parent or the medical practitioner), the child was not

yet a legal person and thus had no legal rights.[4] In other words, a contractual duty cannot be owed to a non-existent person because one can only contract with an existent person.[5]

Apart from breach of contract, however, there are a host of delictual actions available in the context under consideration. As with all delictual actions, (or torts, as they are known elsewhere[6]), a plaintiff must prove the basic elements of a delict. A delict encompasses five elements, namely, harm (or damage as it is known elsewhere[7]), conduct, causation, wrongfulness (or unlawfulness as it is known elsewhere[8]) and fault. Each of these elements needs to be proved in order to have a valid delictual claim. Over time, however, the jurisprudence surrounding each of these elements crystallises in response to the specific type of delictual action at issue, mostly within the context of the wrongfulness element, and rules and patterns in relation to each delictual element therefore develop which can be applied in other similar contexts.

The general means of legal redress available under the delictual strand of recourse is through the wrongful conception/pregnancy action, the wrongful birth action, the wrongful life action and, lastly, by alleging a negligently or intentionally caused

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[4] In Chapter 2, however, I question whether this legal limitation can be defended on moral grounds and argue that it cannot.

[5] There have been attempts here to rely on the *stipulatio alteri*, which is a contract concluded for the benefit of a third party who, at the time of contracting does not yet exist. Suppose, for instance, that Mr X tells Ms Y that he will sell her his Ford Mustang car on condition that she gives his unborn grandson the value of the car once he is born. The contract concluded is therefore for the benefit of the grandson, and once he is born, a right will vest in him against Ms Y to claim the value of the Ford Mustang. Likewise, it has been argued that a doctor, who owes a duty of care towards his pregnant patient, also owes a duty of care to the unborn child, because the contract concluded between the patient and the doctor is for the benefit of the child as well. The legal duty of care that then arises between the doctor and the patient is not only for the benefit of the pregnant mother, but also for the benefit of the child who will benefit by being safely delivered and born healthy. A contractual right to claim for breach of this duty of care then vests in the child once he or she is born.

[6] In England and America, for example, the term 'torts' is used rather than the term 'delicts'. For our purposes, it suffices to note that the two terms can be used interchangeably as different words for the same concept.

[7] The different usage between 'harm' and 'damage' is not as interchangeable as 'tort' and 'delict' above. Both harm and damage can refer to the right which was breached or the interest which has been affected whilst only damage can also refer to the compensation required or ordered.

[8] The term unlawfulness is often used in England and America as a substitute for wrongfulness. It is technically incorrect to describe wrongful conduct as unlawful conduct because unlawful conduct is criminal conduct dealt with under the criminal law, whilst wrongful conduct is civil wrongful conduct. There may however be instances of overlap. In the case of an assault, for instance, a crime is committed and, at the same time, the victim's civil right to bodily integrity is infringed upon. In such a case, the conduct would be both unlawful as well as wrongful.

prenatal injury (known colloquially as a 'prenatal tort'). I will discuss each of these below.

1.2.1 Wrongful conception/pregnancy

Wrongful conception or wrongful pregnancy actions are actions that are based on failed sterilisations and failed abortions. The claim here is that a medical practitioner failed to perform a sterilisation or failed to perform an abortion, which procedures they were contracted to do by the patient. The biological consequence of the medical practitioner's breach of contract is an unwanted pregnancy or an unwanted child and a concomitant, yet unwanted, responsibility placed upon the parent(s) of that child.

This action is the least controversial of the delictual actions in this area, but there are some areas of controversy that plague it. For example, it has been said that "the blessing of giving birth to a healthy child overrides, as a matter of law, any injury incurred by the plaintiffs as a result of that birth." (Meintjes-Van der Walt 1991: 747) The argument is, therefore, that the wrongful conception/pregnancy action will always be illegitimate. It has also been argued that the action has the side effect that the unwanted child which is born is viewed as 'damage' which connotes something negative that gets transposed onto the child. This is thought to be emotionally disturbing for a child.

Judges of different countries or jurisdictions, however, have come up with innovative ways to avoid this negative transposition onto the child. In South Africa, for example, the wrongful conception action is lawful[9] and the judicial technique used to avoid conceptualising the 'meant to be aborted' child as damage is to conceptualise the damage as the financial damage which befalls the parents of the child. Recovery is furthermore limited to parents who did not want the child for economic reasons such as, for example, the fact that they could not afford another child. This is but one example of a judicial technique used to balance the legal and biological consequences mentioned earlier.

[9] *Administrator of Natal v Edouard* 1990 (3) SA 581 (A).

1.2.2 Wrongful birth and wrongful life

Wrongful birth and wrongful life actions take place in a different context. In this context, the parents want a child; however, the child that is subsequently born has some form of unexpected disability or disease, ranging from relatively minor disabilities[10] to some very severe disabilities.[11] In this context, therefore, a child is wanted, but it is a healthy, disease-free and disability-free child that is wanted. Importantly, both wrongful birth and wrongful life actions are premised on the fact that had the parent(s) had knowledge of the disability, the child would have been aborted on that basis. In other words, both actions are premised on the fact that the parents would have chosen selective abortion on the basis of disability or disease.

Once the diseased or disabled child is born, much to the dismay of the parents who wanted and planned for a healthy child, a host of unwanted and unplanned-for damages ensue. On the one hand, there are patrimonial damages. These would include, for example, the costs of medical assistance and special schooling needed by a disabled child. On the other hand, there are non-patrimonial damages.[12] These would include, for example, the associated pain and suffering that may be accompanied by being disabled or by having to raise a disabled child. The purpose of the wrongful birth and wrongful life actions is then to attempt to recover these damages from the medical practitioner who failed to identity or accurately predict the disability or disease.

In order to try and recover these damages within a delictual or tort-based system of civil liability, all the elements mentioned above (harm, conduct, causation, wrongfulness and fault) will need to be proved. The plaintiff will, firstly, have to prove that the medical practitioner failed to identity or predict the disability (i.e. conduct, specifically in the form of an omission) in circumstances in which a reasonable medical practitioner in his or her shoes would have done so (i.e. fault). These two requirements together are referred to as a negligent omission. The more

[10] Such as, for example, missing a toe or having poor eyesight.
[11] Such as, for example, Tay-Sachs disease. Tay-Sachs disease is a fatal disease characterised by deafness, seizures, blindness, paralysis and mental retardation. Death follows within two to four years of birth (Cornwell 1987: 574).
[12] In delictual law, we refer to these as ‘general damages’, whilst patrimonial damages are referred to as ‘special damages’ and involve quantifiable monetary loss.

controversial part of the delictual analysis then comes in when the plaintiff must prove that the negligent omission caused him or her, or them (if we are dealing with two parents), harm. In a wrongful birth action, the parents bring the claim against the medical practitioner and the causation of harm must thus be proven from their perspective. In a wrongful life action, however, the causation of harm that must be proven is harm from the perspective of the disabled child.[13]

This last mentioned claim needs to be emphasised. In the wrongful birth action, the parents bring a claim that the negligent medical practitioner "caused them to suffer the extraordinary expenses and emotional strains of having a defective child whose birth could have been prevented" (Hanson 1996: 2). The emphasis is thus on the damages that the parents subsequently suffer because of the birth of the disabled child. Following the logic of the legal test for harm, if we compare the position before the negligent omission of the medical practitioner (where there are no extraordinary expenses or emotional suffering present) with the position after the negligent omission of the medical practitioner (where there are extraordinary expenses and emotional suffering present) the parents are clearly in a worse off position after the negligent omission than they would have been and have thus been harmed.

With the wrongful life action, however, the child must claim, "that but for the negligence of the [medical practitioner] [I] would have been aborted, and [I was therefore] harmed by being born" (Hanson 1996: 2). The damages in this instance therefore become intricately linked with the child's very existence because in order to prove harm the child must claim that it would have been better had he or she not been born, i.e., not existed. This leads to a floodgate of moral and logical problems, the intricacies of which will be fleshed out in Chapter 2 of this thesis. For the moment, it suffices to say that the problem comes down to the following. In determining whether legal harm is suffered we use the counterfactual comparative test. To show that you have suffered harm you must show, based on the logic of the counterfactual comparative test, that you are in a worse off position than the position you would have been in, had the negligent conduct not occurred. Applying this to

[13] It is important to keep in mind here that a wrongful life action will in most cases be brought by and litigated by the parents, but the case is litigated *on behalf of* the disabled child. The harm in a wrongful life action will thus remain the harm from the perspective of the disabled child.

wrongful life claims, the child would need to claim that he or she would have been better off had he or she not been born by saying that his or her life of disability is worse than no life at all. This leads to what is known as the harm problem, aptly stated by Steinbock (1986: 16):

> It is impossible for a person to be better off never having been born. For if I had never been born, then I never was, if I never was, then I cannot be said to have been better off. For to be harmed is to be made worse off; but no individual is made worse off by coming to exist, for that suggests that we can compare the person before he existed with the person after he existed, which is absurd. Therefore, it is logically impossible that anyone is harmed by coming to exist and wrongful-life suits are both illogical and unfair in that they require the defendant to compensate someone he has not harmed.

It is this problem which leads the wrongful life plaintiff into the majority of its legal hurdles and it is also the basis upon which most courts have rejected the wrongful life action, as will be discussed below. Before moving on to consider this, however, there is one last area of delictual liability to consider, for the sake of conceptual clarity and completeness.

1.2.3 Prenatal injury claims

The last area of delictual liability that needs mention in the context under consideration is the negligent or intentional causation of prenatal injuries, or 'prenatal torts' as they are known colloquially. With these claims, we are dealing with the causation of a prenatal injury whilst in utero which leads to the occurrence of some form of disability once born.

In South Africa, damages that arise due to the causation of prenatal injuries resulting in disability or disease are recoverable. A particularly interesting case in this regard is the case of *Road Accident Fund v Mxolisi Richard Mtati obo Zukhanye Mtati* ("*RAF v Mtati*").[14] In this case, a pregnant pedestrian was struck by a negligent motor vehicle driver and her child was subsequently born (some five and a half months

[14] [2005] 3 All SA 340 (SCA).

later) with brain damage as a result of the collision. The Road Accident Fund pleaded that a foetus in utero was not a legal person and that the insured driver thus owed no delictual duty of care towards the foetus. The court, prompted by the plaintiff's counsel, considered the possibility of the utilisation of the *nasciturus* fiction[15] to found a claim for the child; however, it ruled that it was not necessary as the normal delictual elements, properly conceptualised, could be used to found a claim. The court proposed that by accepting that there may be a time gap between the 'harm causing conduct' and the damage or harm that ensues, a delict could be established, that is, that the harm befell the child once he or she was born into the disabled state. The claim therefore succeeded, and the disabled child was awarded compensation for the causation of her brain damage and the loss which came about as a consequence of the brain damage.

It is important to take note that there is a crucial difference between, on the one hand, wrongful life and wrongful birth claims and, on the other hand, pre-natal injury claims. In *RAF v Mtati*, for example, the child would not have been born with the disability had the defendant acted otherwise and the defendant therefore caused the disability. In a wrongful life and/or a wrongful birth claim, however, the child would have been born with the disability in any event due to biological or genetic forces at play, and in that sense the defendant did not cause the disability per se (Ruda 2010: 204). The claim, in other words, is not that the child was harmed before birth, but rather that the child was harmed by being born (Steinbock & McClamrock 1994: 15). This difference is summarised well in the case of *Gleitman v Cosgrove*,[16] wherein a child claimed compensation from a medical practitioner who had failed to advise his mother about the pregnancy risks associated with rubella and he was born disabled as a result. In the case, one of the judges said the following:

[15] The *nasciturus* fiction refers to a principle in South African law in which a foetus, if subsequently born alive, will acquire all the rights of born children when it is to its advantage (Smit 2015: 42). The fiction is often used in the law of succession where children who are not yet born are nominated as beneficiaries in a will. Consider the following example: The testator nominates his grandsons as the sole beneficiaries of his estate. Upon the death of this testator, however, one of these grandsons is still in utero. By utilising the *nasciturus* fiction, the law is able to hold the unborn child's right to inherit in abeyance until he is born. If he is then born alive, the right will vest and he will be able to inherit his share of the estate.

[16] 49 NJ 22, 63, 227 A.2d 689 711 (1967).

> We must remember that the choice is not between being born with health or being born without it; it is not claimed that the defendants failed to do something to prevent or reduce the ravages of rubella. Rather the choice is between a worldly existence or none at all....

Now that the differences between the various related delictual actions have been properly fleshed out, I turn towards an examination of the wrongful life action specifically. We have above noted that there is a 'harm' problem that seems to plague the action. I now turn to a discussion of how judges and legislatures have explored this harm problem from within the general civil liability system. This discussion will also serve to introduce some of the policy arguments against the action, such as the argument that the action discriminates against disabled persons and that the action could lead to a slippery slope wherein children could claim against their parents for being born, which I will later analyse in Chapter 4 in greater detail.

1.3. The legal community's response to wrongful life actions

The legal community's response to wrongful life actions is far from uniform owing of course to the different ideologies and hierarchy of rights at play in each different jurisdiction or country.[17] It is, therefore, somewhat difficult to present a complete comparative legal analysis of wrongful life actions. What this section will do, however, is group the legal community's response into two groups, being those countries that have been against permitting the claim and those countries that have been in favour of permitting the claim (although having perhaps subsequently disallowed it). The purpose is to show how the 'harm problem' has been written into law in the form of legislation or incorporated into the common law through judicial incremental development.

[17] It is noteworthy, for instance, that wrongful life claims are only logically possible in countries where abortion is legal (Chürr 2015: 745) and specifically where abortion on 'eugenic' grounds is legal (Ruda 2010: 207).

1.4.1 Countries against permissibility

It appears that the general trend has been to not allow the action at all (Mukheibir 2005: 757). The claim has not been allowed to succeed, for example, in England, Australia, Germany and most American states. This is mostly based on the inability to prove harm and calculate damages (what I have termed the harm problem, briefly discussed above). In Australia for instance in the case of *Harriton v Stephens*[18] the court said, upon being confronted with a wrongful life action, that a "duty of care cannot be clearly stated in circumstances where the appellant can never prove (and the trier of fact can never apprehend) the *actual damage* claimed..." (my emphasis). In England, moreover, in the case of *McKay v Essex Area Health Authority*,[19] the decision turned on the argument that that the non-existence or 'not-being' of the child could not be conceptualised in monetary terms and, therefore, that no damages award was conceivable. The court stated the following in this respect in paragraph 771 of the judgment:

> How can a court begin to evaluate non-existence, 'The undiscovered country from whose bourn no traveller returns?' No comparison is possible and therefore no damage can be established which a court could recognise. This goes to the root of the whole cause of action.

Section 1(2) of England's Congenital Disabilities (Civil Liability) Act of 1976 furthermore now bars any wrongful life claim for a child born after the Act's passing into law.

In America, a wrongful life action has only been recognised in three states, being the states of California, New Jersey and Washington. Most other states have been divided in either hearing the action but ruling against it or dismissing it during the pleadings stage on the ground that it does not even disclose a cause of action. In Illinois, for instance, in the case of *Siemienic v Lutheran General Hospital*,[20] the court

[18] (2006) 226 CLR 52, Para 276
[19] (1982) All ER 771 (CA).
[20] 117 Ill. 2d 230 (1987).

took this latter approach. In a case where the court actually proceeded to hear the case, the judges came to the following ruling, in *Speck v Finegold*:[21]

> Whether it is better to have never been born at all rather than to have been born with serious mental defects is a mystery more properly left to the philosophers and theologians, a mystery which would lead us into the field of metaphysics, beyond the realm of our understanding or ability to solve. The law cannot assert a knowledge which can resolve this inscrutable and enigmatic issue.

In Germany, the wrongful life claim has also not been allowed to succeed on the basis of the complexities surrounding the plaintiff's harm. However, the highest court in Germany also relied heavily on the disability discrimination objection in its refusal of the claim.[22] The court was of the opinion that recognising such an injury in the case of a wrongful life claim "would infringe the interests of all physically and mentally disabled persons" and that it would therefore go against the German constitutional provisions in terms of dignity, equality, and so on (Chürr 2015: 759).

1.4.2 Countries in favour of permissibility

In respect of the countries that have allowed the wrongful life action there are the Netherlands, Israel, France, and the American states of New Jersey, Washington and California. Some of those countries, however, have subsequently gone against that decision in later years, as will be seen below.

In the Netherlands, in the *Kelly Molenaar* case,[23] a wrongful life claim was allowed. The court was not persuaded by the argument that harm and damages could not be legally conceptualised. Instead, the court relied on Article 6:97 of the Dutch Civil Code which provides that, in each case, damage must be assessed "in accordance with the method which is most appropriate to the nature of the damage" (Mukheibir 2005: 756). The court ruled that awarding damages for pecuniary loss in this context would not lead to the conclusion that life with disabilities is worth less than life

[21] 408 A 2d 496 (1979).
[22] 86 BHGZ 240 (1983).
[23] C03/206, RvdW 2005.

without disabilities. An award of damages, according to the court, merely serves to remedy the fact that disabled life does come with a unique set of challenges and that an award of pecuniary damages would enable a disabled child to improve his or her living conditions (Mukheibir 2005: 760).

The *Kelly Molenaar* decision is evidently also one of the most radical wrongful life decisions in that the court also awarded the plaintiff general damages for pain and suffering in addition to her special damages (the direct financial damages associated with the plaintiff's situation). The court ruled that there had been an infringement of the plaintiff's person, owing to her severe handicaps "which she could have been spared had the parents terminated the pregnancy" (Mukheibir 2005: 756).

In California, in the case of *Turpin v Sortini*,[24] a wrongful life claim was allowed in part in that the court only allowed the claim for special patrimonial damages to succeed and not the general damages claim. The court reasoned that traditional rationales against the action were only persuadable against the general or non-pecuniary damages claim (such as pain and suffering for example) but that "the financial burden on the plaintiff's family and the ability to measure special [patrimonial/financial] damages without difficulty justified recovery" (Schuster 2016: 2336).

In South Africa, in the case of *H v Fetal Assesment Centre* ("*H v FAC*"),[25] the court ruled that a wrongful life claim was viable in principle (although the lower court is now to decide the merits of the claim *in casu*) but that it should only succeed, assuming all the delictual elements are met on the facts, if a wrongful birth claim is not simultaneously available to the parents. The court said that the burden on the parents and the burden on the child should be viewed as a single one so as to balance the burden put upon medical practitioners in this context.[26] The *H v FAC* case is also well-known for invoking the 'best interests of the child' principle as

[24] 31 Cal.3d 220 (1982).
[25] 2015 (2) SA 193 (CC).
[26] Paragraph 65.

something that should be considered when deciding wrongful life cases, which none of the other cases to date have done.[27]

In France, in the case of *Nicholas Perruche* ("*Perruche*"),[28] a wrongful life claim was upheld in the Supreme Court. The court said that it was not necessary to take into consideration the fact that the only way that Nicholas Perruche would have been born without the defects was if he were not born at all, as this was apparently a purely ethical consideration and not a legal one (Callus 2001: 120). The court in *Perruche* furthermore conceptualised the problem not as one of harm or damage, but one of causation. The court, however, found a way to establish the causing of harm by linking the medical practitioner's negligence to Nicholas' mother's desire and right to terminate the pregnancy and in that way "identified the loss of the child, not as the handicap from which he suffers, but as the loss of the chance never to have been born" (Callus 2001: 120). The court's decision, however, subsequently sparked an outcry in France and protests ensued, both by disabled members of French society (who regarded the decision as an infringement upon their dignity) as well as medical practitioners (who responded by refusing to perform routine ultra-sounds). The French Parliament ultimately enacted legislation prohibiting wrongful life actions.

In Israel, in the case of *Zeitsov v Katz*,[29] a wrongful life claim came before the Israeli Supreme Court and a wrongful life claim against a medical practitioner was recognised in principle, although the case was to be subsequently sent back to the lower court for a decision on the merits (a similar situation to that in *H v FAS*). What is most interesting about this case is the detailed philosophical analysis the judges went into, rather than attempting to stave off metaphysical and ethical considerations as most other courts had done. One judge for instance (Judge Ben-Porat) confronts the harm paradox head-on by accepting "the possibility of comparing the child's life with his non-life, the latter being a real alternative to the former" (Heyd 1986: 584). Judge Ben-Porat's view was that in some instances, albeit very rare instances, it would in fact be better for someone not to be born rather than to be born and suffer

[27] Paragraphs 63-64.
[28] Cour de Cassation, 701, 17 November 2000.
[29] (1986) 40(ii) P.D. 85.

from the particular disease or disability in question (Carmi 1990: 778). She even went so far as to provide us with a criterion for how to go about identifying these types of rare instances she envisages, by relying on the criterion of the reasonable person.[30] Her argument is that we can delineate the line between serious disabilities that make life not worth living and not-so-serious disabilities which do not have this effect, by relying on how the reasonable person of average intelligence would conceptualise the line between the two.

From the discussion above, it is clear that the approach to wrongful life actions has been far from uniform around the world. Different jurisdictions have responded in different ways by either prohibiting the action (England, Australia, Germany), allowing the action completely (Netherlands), allowing the action but then legislating against it (France) or allowing it but only in part by limiting it to the recovery of special financial/pecuniary damages (California) or to instances where a wrongful birth claim is not simultaneously available (South Africa). It can therefore be said that different jurisdictions or countries have attempted to balance the legal and biological consequences in very different ways, and for very different reasons. This proves that a more in-depth philosophical analysis of the wrongful life action and its perplexities is worthwhile to pursue, and may provide a scaffolding or baseline for a more universal legal approach to the action.

1.4. Concluding remarks

The aforegoing discussion has attempted to shed light on damage recovery in this controversial area of civil liability and specifically on how courts as well as some legislatures have dealt with the balancing of the legal and biological consequences discussed earlier. A further purpose of the discussion was to introduce the legal context in which the wrongful life action arises and the controversial aspects of the action that have been identified by judges and lawmakers.

[30] The ‘reasonable person’ is a hypothetical legal construct which is meant to represent how a typical or right-thinking member of society would behave in or think about a particular situation.

It was shown, for example, that the most prominent argument against recognition of the action centres on problems with the application of the legal test for harm. It became evident that courts have generally refused to permit the action on this basis. It also became evident that courts, apart from the Israeli court in *Zeitsov v Katz*, have made conscious and focussed efforts to *avoid* addressing the harm paradox in order to keep metaphysics and ethics out of the law. In the next chapter of this thesis, Chapter 2, I will attempt to show why this attempted separation is unfortunate and problematic. More specifically, I will argue that the account of harm upon which the legal test for harm is based turns out to be a deeply flawed account of harm which does not accord with our intuitions surrounding harmfulness. I will argue that a better account of harm exists, through which the wrongful life plaintiff's harm is better conceptualised and through which our intuitions regarding harmfulness are well accommodated.

It was also shown, in the discussion above, that the wrongful life action has a seemingly complicated relationship with disability as a normative concept. The contrast between the court's position in Germany that the action infringes upon the dignity rights of disabled persons, and the court's position in the Netherlands (in the *Kelly Mollenaar* case) that a compensatory award is necessary in order to affirm the rights of disabled persons, makes this clear. The practical effect of the *Perruche* case in France, moreover, whereby disabled persons protested against the decision and the fact that the legislature had to then enact legislation prohibiting the action, shows that the action has an importance normative effect on the lives of disabled people. In sections 3 and 4.1 of this thesis, I take up these arguments further. I will argue, for instance, that the wrongful life action can actually have a *positive* normative effect on the lives of disabled persons in that the action can function as a form of positive accommodation.

Chapter 2: The harm paradox within the wrongful life action

2.1 Introductory remarks

As can be seen from the discussion on the response of the legal community above, the main obstacle to recognition of the wrongful life action is the inability of the legal community to comfortably conclude that the wrongful life plaintiff was harmed. As was also preliminarily noted, this is because the way that harm is legally determined is by adopting a counterfactual comparative approach to harm. More specifically, determining harm, legally, involves comparing two objective states and, in that sense, it is a comparative account of harm. Upon comparing these two states, furthermore, harm is evidenced by proving that the plaintiff has moved into an objectively worse state *than he or she would have been in* had things been otherwise. The comparison of harm therefore rests on a counterfactual comparison. We can therefore conclude that the legal nature of harm is underpinned by a counterfactual comparative account of moral harm.

Upon an analysis of the wrongful life action along these lines, it seems as though the conduct of the medical practitioner benefitted rather than harmed the wrongful life plaintiff. This is because the objective position that the wrongful life plaintiff would have been in had the negligent medical practitioner acted lawfully would be non-existence because he or she would have been aborted and would therefore not have existed, and non-existence is worse than existence albeit with a disability, or so the argument goes. The wrongful life plaintiff has therefore actually moved into a better position than he or she would have been in had the medical practitioner acted otherwise. Therefore, the action of the negligent medical practitioner benefited rather than harmed the disabled child.

At the same time, however, I would argue that, intuitively, the medical practitioner has harmed the child. Let us return to the example of Jim mentioned in the introduction. Jim is disabled, has severe breathing problems and experiences chronic pain and immobility. He also feels that he misses out on many meaningful experiences as a result of his disability. These are harmful conditions that would not

have occurred, had the medical practitioner acted otherwise. They are, therefore, imposed upon him. Thus, the harm paradox arises. Intuitively, we want to say that the wrongful life plaintiff was harmed by the conduct of the medical practitioner, but we cannot comfortably conclude this if we take harm to be an objective counterfactual worsening of one's position.[31] In this chapter of the thesis, I want to subject this harm paradox to closer analytical scrutiny. In summary, I will attempt to show that the intuition that the wrongful life plaintiff is harmed by the medical practitioner can be accommodated if we follow a subjective approach to harm, whereby harm is not understood as objectively rendering a person worse off, but rather as imposing upon a person a condition or state which does not accord with his or her will. I will also argue that harm can be retroactive in nature, in that the subjective effects of harm can arise after the fact, because it is not morally imperative that the harm causing act and the harmful effects of that act take place simultaneously.

In order to make these claims, I will start by providing a closer examination of the counterfactual comparative account of harm. Following this, I will discuss three instances wherein the counterfactual comparative account of harm leads to results that do not accord with our intuitions surrounding harmfulness, namely, in cases of pre-emption, omissions and failures to benefit, and in the case of future persons who would not exist but for our harmful actions (encapsulated under what is known as the non-identity problem). I will then discuss some attempts at addressing these problems from within the counterfactual comparative domain, but will try to show that these attempts generally fail. I will ultimately conclude that the counterfactual comparative account of harm does not adequately capture what is intuitively harmful about harm.

Following this, I will move to consider accounts of harm which are non-comparative in nature, and will analyse whether these accounts fare better in terms of the aforementioned three problematic contexts. I will try to show that they do. I will specifically argue that the deviation between the results that the counterfactual

[31] I pause here to note that in this thesis I am not primarily concerned with the responsibility or accountability of the medical practitioner. Rather, I am interested in the possible harm suffered by a wrongful life plaintiff, irrespective of whether there is someone that should be held accountable for that harm.

comparative accounts of harm give us and the results that our intuitions regarding harmfulness give us does not arise if we adopt a non-comparative account of harm. I will furthermore specifically argue that the best non-comparative account of harm that we have on offer is Shiffrin's will-based account.

I will also address the concern that Shiffrin's account of harm has the effect that only persons with wills can be harmed and that at the time that a disabled child is born, he or she does not really possess a will. I will try to show that this hurdle can be overcome by acknowledging that harm can be retroactive in nature in that there can be a time gap between the harming event and the harmful felt effects of that event. In summary, I will therefore argue, in this chapter, that the wrongful life plaintiff has been harmed if we follow Shiffrin's account of harm, coupled with an acceptance that harm can be retroactive, and that this account of harm is the best account available.

Before proceeding with the above, however, it would be wise to pause to consider the importance of such an endeavour. That harm is an extremely important concept seems to be a truism. Restrictions against harming are found in a variety of contexts such as the moral context, the legal context, the political context, the criminal context and the medical context (Shiffrin 2012: 357). Concrete examples of such restrictions can be found, for example, in the Hippocratic Oath (do no harm to your patient) and in Mills' Harm Principle (be free to live as you wish so long as you do no harm to others) (Bradley 2012: 390). It can therefore be said that the concept of harm is one of the most important yardsticks against which we measure our conduct. What is more, harm has important legal ramifications and consequences. People are imprisoned or forced to pay out large sums of money for harming other people. It is therefore vitally important that the nature of harm is properly understood and that we have an adequate account of harm upon which to rely in order to justify these legal ramifications.

Unfortunately, despite the centrality and importance of the concept of harm there is little literature, until fairly recently, detailing and discussing what harm actually is (Bradley 2010: 391, De Villiers-Botha 2018: 1). This is unfortunate for a variety of reasons, the most prominent for our purposes being that the account of harm generally underpinning the legal account, being the counterfactual comparative

account, has possibly not undergone enough analytical scrutiny. It becomes pertinent to ask whether the philosophical theory of harm upon which the legal theory of harm rests is a solid foundation, and whether there are not perhaps other accounts or theories of harm which might fare better, a question which I aim to take up in this chapter.

2.2 The counterfactual comparative account of harm

The counterfactual comparative account of harm can be described as follows: an event harms a subject if and only if its occurrence moves the subject into a position whereby he or she is worse off than the position which the subject would have been in, objectively speaking, had the event not occurred. In other words, "a harmful event is an event that makes things go worse for someone, on the whole, than they would have gone if the event had not happened [and] [c]onversely, a beneficial event is one that makes things go better for someone" (Bradley 2012: 396). By this logic, "[t]he *harmfulness* of an event depends on a comparison with how things would have been had the event not occurred" (Feit 2015: 361, own emphasis).

An important feature of this model is that harms and benefits are seen as symmetrical and occupying opposite ends of the same scale. To decide whether a person has been harmed by an event, we look to where on the scale the person is, objectively, after the event and where on the scale the person would have been, objectively, had the event not occurred. If the person has moved down on the scale, then they have been rendered worse off and the event has harmed that person whilst if the person has moved up on the scale they have been made better off and the event has benefited that person.

We thus know that on this account if an event has the effect that it moves a person down on the scale, then they are harmed and that if an event has the effect that it moves a person up on the scale then they are benefitted. But how, precisely, is a person affected by a particular event such that it has either of these two effects? The

well-cited account of harm of Joel Feinberg can help us to conceptualise this.[32] On Feinberg's account, the effect of harms and benefits on a person is assessed relative to a person's overall network of interests.[33] An interest, he says, is a "distinguishable component of a person's good or well-being" (Feinberg 1985: 58). An interest is therefore something that a person has a stake in, ranging from short-term goals to long-term goals to general or over-all important life achievements. When a person's interest has been negatively affected as a result of an event, they have been made worse off, whilst if a person's interest has been advanced as a result of an event, they have been made better off. "[T]he determination of harms and benefits is [therefore] unavoidably affected by the prior locations, high or low, of interest states on the graph" (Feinberg 1985: 59).

Consider the following example. Suppose that an elderly citizen, Alastair, who has a very small pension that is barely enough to survive on, decides that he wants to invest all of his life savings into something that will render a high return so that he will have enough money to live comfortably. He gets into contact with a financial advisor who invests the funds for him. It later turns out that the financial advisor actually invests the funds into his own 'Ponzi scheme' and Alastair loses all his money. In this scenario, because the funds were so crucial to Alastair's future economic viability, we can say that the financial advisor has affected Alastair's interests in the following ways. The financial advisor's conduct has had the effect that the interests of Alastair has been set back (in that it has reversed its course or been put back to where it started); been defeated (in that it has been irrevocably destroyed); and been thwarted (in that its progress has been opposed) (Feinberg 1984:53), which all have the effect that Alastair is moved down the scale and is harmed.

Drawing on the above, we can say that the counterfactual comparative account, in this context, adheres to the following understanding of harm. Each person has a web

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[32] See Feinberg, J. 1984. *Harm to Others* (Oxford University Press); Feinberg, J. 1985. *Wrongful Conception and the Right Not to be Harmed*. Harvard Journal of Law & Public Policy; and Feinberg, J. 1992. Wrongful Life and the Counterfactual Element in Harming. In *Freedom and Fulfilment: Philosophical Essays*. Princeton: Princeton University Press.

[33] 'Interests' are, however, not the only mechanism that can be used to conceptualise harm on the counterfactual comparative account. Harm can also be conceptualised, for example, as moving towards pain and moving away from pleasure or moving towards unhappiness and moving away from happiness.

of interests, ranging from basic necessities such as water and food (Feinberg calls these welfare interests) to higher-order life goals (Feinberg calls these ulterior interests). An event, furthermore, can either "promote them in his advantage ... [or] thwart them ... to his detriment" (Feinberg 1984: 34). If the event promotes them, the person moves up on the scale and the person has been benefitted. Conversely, if the event thwarts or sets them back, the person moves down on the scale and is harmed.

Admittedly, the counterfactual comparative account is appealing. It seems to accord with an economic style of thinking wherein harms and benefits are determined by a kind of cost-benefit analysis (Shiffrin 2012: 367). This is probably the reason why the approach is used within the legal context.[34] In fact there are other benefits, *inter alia*, that it is not limited to particular types of subjects (and can therefore apply to other entities other than human beings, such as animals); that it is an account of extrinsic harm rather than intrinsic harm[35] (and therefore does not depend upon any one particular conception of welfare or well-being which ensures that universal evaluations of harm are possible); and that it does not merely list different harms and benefits but rather provides a unified account or a universal test for harm (Bradley 2012: 396-397). However, the counterfactual comparative account of harm also faces some serious difficulties and clashes with our intuitions surrounding harmfulness in many respects. Some have argued that these difficulties are

[34] I pause here to note, however, that the counterfactual comparative account of harm has led to some problems within the legal context. The case of *De Vos v Suid-Afrikaanse Eagle Versekeringsmaatskappy Bpk* 1985 (3) SA 499 (A) is a pertinent example. In that case, the deceased had applied for a life insurance policy which would pay out on condition that at least the first premium has been paid before his death. The policy holder (the deceased) had unfortunately died before this first premium could be paid. The wife of the deceased then attempted to claim the value of the life policy from the defendant who had caused her husband's death. The court was consequently tasked with deciding whether the wife of the deceased had suffered harm that would then be recoverable from the defendant. Upon applying the counterfactual test for harm, the court had to compare her current position (wherein she is not entitled to the proceeds of the life policy because the first premium had not been paid) with the counterfactual position which would have occurred had the defendant not caused the death of her husband. The court ruled that if her husband had not died she would in any event not have been entitled to the proceeds of the life policy as her husband would still have been alive and the policy would not have been activated. Therefore, in applying the counterfactual comparative test, she had not suffered any harm because she was not now in a worse off position than she would have been in had the defendant not caused the death of her husband.

[35] Extrinsically harmful states are states which are not harmful in themselves, but which rather lead to or cause intrinsically harmful states. For example, smoking may colloquially be said to be harmful, but the actual harm which the smoker suffers (in the form of say, lung cancer or a heart attack) *comes about* as a result of smoking. The act of smoking a cigarette is therefore not harmful in itself. In contrast, consider the example of pain, which is generally thought to be harmful in itself.

insurmountable (Bradley 2012, Shiffrin 1999; 2012, Hanser 2008; 2011), whilst others have argued that they are solvable (Thompson 2011, Hanna 2016, Klocksiem 2012). It is to these difficulties which we now turn.

2.3 Problems with the counterfactual comparative account of harm

According to Bradley (2012: 394), one of the desiderata of a good account of moral harm is what he terms "extensional adequacy" by which he means that the analysis must fit the data. More particularly, a good moral account of harm must accord with our intuitions about when events are harmful and when they are not. Intuitively, certain things are harmful and certain things are not and we should favour the analysis which gets all the data right. Based on this logic, accounts or analyses of harm which lead to results that are at odds with our intuitions about harming should be rejected. Shiffrin echoes this when she says that a good theory of harm:

> ...should identify harm in such a way that captures most of our central, intuitive judgements about what counts as harm, while supplying some unifying understanding of why all the conditions we recognize as harms fit together (2012: 358).

It can be argued that the counterfactual comparative account of harm does not accord with our intuitions regarding harmfulness in a variety of contexts. In what follows, I will focus on three of these contexts. Firstly, I will look at cases of pre-emptive harms whereby an intuitively harmful event is rendered not harmful, upon the logic of the counterfactual comparative account, because it is followed by another more harmful (or equally harmful) event, and the subject is therefore not rendered worse off by the occurrence of the first event. Secondly, I will look at omissions and failures to benefit. In this context, the counterfactual comparative account of harm seems to count mere failures to benefit as harmful omissions. Following this, I will then, lastly, move over to the non-identity problem. The problem here is that, on the counterfactual comparative understanding of harm, future or possible people cannot be harmed by actions of existent people if those same actions are also necessary conditions for their own worthwhile existences, because they are not thereby rendered worse off (Parfit 1984: 357). This is also notably the

precise structure of the moral argument against recognition of the wrongful life action.

2.3.1 Pre-emptive harms

Pre-emptive harms occur when “an intuitively harmful event befalls a subject moments before a second, equally intuitively harmful event ... [and] the first event is rendered not harmful, due to the existence of the second” (De Villiers-Botha 2018: 9). A well-cited example is that given by Bradley (2012: 397) and is known as ‘Batman’s heart attack’. The example proceeds as follows:

> Suppose Batman drops dead of a heart attack. A millisecond after his death, his body is hit by a flaming cannonball. The cannonball would have killed Batman if he had still been alive.

On the counterfactual comparative account, Batman was not harmed by the heart attack. This is because the heart attack did not make things go worse for Batman, as he would have died a millisecond later in any event by being hit by the flaming cannonball. The problem, however, is that intuitively the heart attack seems harmful to Batman because, intuitively, dying from a heart attack is something harmful (De Villiers-Botha 2018: 9). In other words, the counterfactual comparative account here fails to count a harmful event as harmful and, therefore, is not an extensionally adequate account of harm.

Some have argued that the counterfactual comparative account can accommodate pre-emptive harms in ways that do accord with our moral intuitions. Hanna (2016: 262-263) for instance, tries to do this. Hanna argues that the intuitive problem comes to the fore because we have failed to distinguish between *pro tanto* harm and overall harm. This distinction is mirrored in the distinction between harm in a respect versus harm all-things-considered. Suppose, for instance, that a person must undergo a painful surgery in order to save his or her life. In this instance, we can say that although the patient may suffer some pain as a result of the surgery, the surgery is, all-things-considered, beneficial for the patient. Therefore, the pain which the patient must endure is seen only as a *pro-tanto* harm or harm only in a respect. Similarly, a

rescuer who breaks the arm of an endangered person whilst trying to perform a rescue does not harm the endangered person all-things-considered, but only in a respect, so that the broken arm is viewed only as a *pro-tanto* harm (Feinberg 1992: 27).

Hanna applies this argument structure to the heart attack example. Hanna argues that the heart attack that Batman suffers is only a *pro-tanto* harm and not an all-things-considered harm to Batman. Therefore, according to this argument, the counterfactual comparative account can accommodate the intuition that Batman was harmed by the heart attack in that it can be seen as a *pro-tanto* harm, but not an overall harm, seeing that he would have been hit by a flaming cannonball directly after.

De Villiers-Botha (2018), however, argues that this sort of analogy fails. According to her, there is an important difference between Batman's Heart Attack and the surgery or rescue examples that Hanna refers to. That is, only in the latter cases of the surgery and the rescue is "there a clear causal link between the *pro tanto* harming event and the potentially worse harming event that it prevents [such that] the *pro tanto* event is unambiguously necessary to prevent the worse harm from occurring" (2018: 10). In pre-emption cases like Batman's heart attack, on the other hand, there is no necessary connection between the two events other than the fact that they are in close temporal proximity.

Another possible way to get around pre-emptive harms within a counterfactual comparative understanding of harm is to rely on the distinction between intrinsic and extrinsic harm and argue that only intrinsic harm is relevant in the context of pre-emptive harms. This is the route Klocksiem (2012) takes. Klocksiem argues that the intuitive problem in pre-emption cases arises because we have failed to make a necessary distinction between intrinsic and extrinsic harm, and specifically "between the event that constitutes the harm [the intrinsic harm] and the related event that is its cause [the extrinsic harm]" (2012: 295). The example Klocksiem uses to explain this is the following (2012: 295):

> Archie's Broken Legs:
> Veronica breaks Archie's legs just before Betty has a chance to break them. Since Archie's legs would have been broken anyway, Veronica does not make things go worse for Archie than they would otherwise have gone.

According to Klocksiem, it is only intrinsic harm which ought to be considered here. The intrinsic harm in the above example is the pain and anguish associated with Archie's broken legs or the desire frustrations he will experience as a direct result of the broken legs (2012: 295). This, according to Klocksiem, is the harm which Archie actually suffers. The physical breaking of Archie's legs by Veronica or Betty is an extraneous feature of the harm and can therefore be regarded as an extrinsic harm to Archie. Based on this, Klocksiem says that the relevant counterfactual comparison is between a world in which Archie has pain and anguish associated with his broken legs and a world in which he does not, and not between a world in which Veronica breaks Archie's legs and a world in which Betty does.

The only way to buy into Klocksteim's approach is if we are willing to endorse the notion of intrinsic harm. The problem, however, is that intrinsic harm relies on notions of substantive well-being and there are a host of difficulties and disagreement regarding what constitutes well-being.[36] Some interpret well-being as pleasure, some as fulfilled desires and some even as being virtuous.[37] By the same token, a lack of well-being could be because of pain, desire frustration or the lack of a good moral character. In order to have a unified account of harm, however, it may be important to avoid presupposing any substantive theory of well-being. Bradley (2012: 394) summarises this as follows:

> Proponents of different axiologies should be able to agree – at some suitable level of abstraction – about what it takes for someone to be harmed, even if they might disagree about whether pain, or frustration, or something else, is required for harm.

[36] See Holtug (2002) *The Harm Principle* in *Theory and Moral Practice*, in this regard.
[37] Aristotle, for instance, thought that happiness depended upon having a good moral character.

Some philosophers have endorsed the notion that what makes something intuitively harmful is precisely that it affects well-being. De Villiers-Botha (2018), for example, has posited that in cases of pre-emptive harms the divergence between the results that the counterfactual comparative accounts gives us and the results our moral intuitions give us arises because we fail to acknowledge the implicit role of well-being when ascribing harm (2018: 13). According to De Villiers-Botha, "our intuitions are not based simply on whether or not the subject is worse off but on whether or not [their] well-being has been affected in an appropriate way" (2018: 15). Our intuition in Batman's Heart Attack, for instance, is that Batman was harmed by the heart attack irrespective of whether he would have been hit by a flaming cannonball a millisecond after. Our intuition is such, according to De Villiers-Botha, because we naturally assume that Batman experiences sufficient or normal levels of well-being and that death therefore negatively impacts on his levels of well-being.

Parfit (1984) argues that pre-emptive harms can be accommodated on the counterfactual comparative account and in a way which keeps to an extrinsic conceptualisation of harm, by adopting a principle of group harming. On Parfit's logic, in the case of Archie's Broken Legs, both Veronica and Betty together harm Archie (Bontly 2016: 1239). "They together harm [Archie] because, if both had acted differently, [Archie] would not have [had his legs broken]" (Parfit 1984: 71). However, we could also say that Archie would not have had his legs broken if the bus driver had been a little late in stopping at the bus stop where Archie was waiting that day on his way to go and meet Veronica and Betty, or perhaps if the car driver had not stopped at the pedestrian crossing when Archie was busy crossing the road on his way to meet Veronica and Betty. The point is that if every single person in the world had acted differently, Archie might not have had his legs broken, and therefore by this account, many people are responsible for arming Archie. This cannot be right since it would lead to unlimited liability and we would lack a definitive wrongdoer. Parfit anticipates that and adds the proviso that: "When some group together harm ... other people ... this group is the smallest of which it is true that, if they had all acted differently, the other people would not have been harmed..." (Bontly 2016: 1239).

According to Norcross (2005), Parfit's doctrine of group harming is problematic because we can think up scenarios in the case of pre-emptive harms wherein it can

be concluded that only one of the parties harms the victim, in instances where intuitively both parties do. Consider Norcross' example below, adapted by Bontly (2016: 1240), and further adapted by myself:

> Murder at the Oasis:
> Both A and B hate Traveller and want to kill him. A decides to poison Traveller's water bottle with a fatal poison. Traveller notices a strange odour in his water bottle and decides to stop at an oasis to buy a new bottle of water. B recognises Traveller at the oasis as the man that he hates and shoots him dead.

Using Parfit's group-harming approach, we have the result that only A harms Traveller and not B. Why? Because had A not poisoned Traveller's water, Traveller would not have stopped at the oasis and been killed by B. If however, B had not shot Traveller, A's act would have killed Traveller in any event. Therefore, "A is the sole member of the smallest group of people of whom it is true that, had they all acted differently, Traveller would have been better off" (Bontly 2016: 1240). This does not accord with our moral intuition that both A and B harm Traveller.

Let us take stock. We started off by saying that the counterfactual comparative account does not fare well in the context of pre-emptive harms because the conclusions reached in respect of harm do not accord with our intuitions. We then looked at the approaches of Hanna, Klocksiem and Parfit at saving the counterfactual comparative account in the context of pre-emptive harms. We found all of these approaches to be problematic in at least one respect. It can therefore be said, at this juncture, that the pre-emption problem presents a serious difficulty for the counterfactual comparative account of harm.

2.3.2 Omissions and failures to benefit

Another context in which the counterfactual comparative account of harm is argued to misrecognise harm is in the context of negative action or omissions. "Moral common sense [seems to] hold that harming a person is a graver offence than merely failing to benefit him, even if each form of treatment leaves him in the same position" (Purves 2019: 2629). The counterfactual comparative account, however,

seems to count all negative action or all omissions as harmful, including mere failures to benefit, which are intuitively not harmful, because in such instances the subject is also left in a worse off position counterfactually. In this sense, the account over-determines harm and is therefore argued to be extensionally inadequate. Consider De Villiers-Botha's (2018: 4) example below:

> One Hundred Dollars:
> Batman has $100 in his pocket, but does not give it to Robin.

On the logic of the counterfactual comparative account, Batman has harmed Robin by his omission, because Robin would have been better off had Batman given him the hundred dollars. This, however, does not accord with our intuitions. Ordinarily, we would not regard Batman's conduct as harmful to Robin in this example.

Hanna (2016) again tries to save the counterfactual comparative account from this charge. According to Hanna, only *events* are harmful under the counterfactual comparative account. In the case of One Hundred Dollars, however, there is no event that takes place and there is, therefore, no harm that is done to Robin in Batman not giving Robin the money. De Villiers-Botha (2018: 4), however, argues that the argument which relies upon the non-occurrence of an event only makes sense in instances where the potential harmer is an entirely passive agent. In respect of One Hundred Dollars, for instance, "to plausibly constitute a non-event, Batman cannot even *conceive* of the *possibility* of giving the money to Robin in the first place, as this would leave him in a position where he needs to decide for or against the action" which would then constitute an event (2018: 4). To see why this is true, consider Bradley's Golf Clubs example below (2012: 397):

> Golf Clubs:
> Suppose Batman purchases a set of golf clubs with the intention of giving them to Robin which would have made Robin happy. Batman tells the Joker about his intentions. The Joker says to Batman, 'why not keep them for yourself?' Batman is persuaded. He keeps the golf clubs.

In this scenario, Batman considers the possibility of benefitting Robin. He specifically purchases the golf clubs with this intention in mind. As soon as Batman changes his mind and decides to keep the golf clubs, an event takes place and he is therefore no longer passive in relation to Robin's non-benefit. Hanna's non-occurrence defence therefore does not work in this context.

Klocksiem (2012) also makes an attempt to save the counterfactual comparative account from the omission problem delineated above. In illustration of his argument, Klocksiem asks us to compare two examples, which I have again briefly adapted.

> a) Betty's Hat:
> Archie buys a hat on Saturday afternoon with the intention of giving it to Betty on Monday as a present. On Monday, he tries it on, likes the way it looks, and decides to keep the hat for himself instead.
>
> b) Betty's Nurse:
> On Saturday afternoon, Archie promises to Betty that he will serve as her nurse after her surgical operation on Monday. On Monday morning he wakes up and decides to rather spend the day with Veronica.

According to Klocksiem, whether or not an event counts as a serious omission (and therefore a harm) or a mere failure to benefit depends upon extra contextual details in addition to whether the person is rendered better or worse off. Klocksiem says, for instance, that we generally regard refraining from action as morally permissible, unless there are extra contextual details which render the omission special or unusual and which thereby compel the moral agent to act. In Betty's Nurse, for example, Archie has additionally broken a promise made to his friend and he has ignored his friend in her time in need. In Betty's Hat there is no such extra moral responsibility that arises which compels action.

According to Klocksiem, in cases where we consider the actor to have some extra moral obligation to act, such as in Betty's Nurse where Archie is obliged to act because he has made a promise to his friend in her time of need, we regard performing the act as his default action and we conceptualise the nearest possible

world as the world in which his default action is performed.[38] Then, when the counterfactual comparison takes place, we compare a world in which Archie serves as Betty's nurse (the default world) with a world in which he does not and can then conclude that Betty has been rendered worse off. More succinctly, "we take serving as nurse to be Archie's default action because he is obligated to do so, conclude that Archie did affect Betty's welfare and classify it as a harm" (2012: 294). Compare this to Betty's Hat, wherein there is no special obligation, and in which the nearest possible world is, therefore, not one in which Archie by default gives Betty the hat. When the counterfactual comparison takes place, we therefore conclude that Betty is no worse off because in the next possible world, she is not given the hat anyway. In Betty's Hat, we are therefore dealing merely with a failure to benefit and not a harm. Klocksiem fleshes this out further by explaining that:

> If the world in which S is better off is very similar to the comparison world, and so an intervention was required to prevent that world from coming about, we are more likely to regard the relevant event as a harm. If the world in which S is better off is not very similar to the relevant comparison world, and so an intervention was required to bring it about, we are likely to regard the relevant event as a failure to benefit (2012: 295).

In the context of Betty's Nurse, the world in which Betty is better off (a world where Archie serves as her nurse) is very similar to the comparison world (a world where Archie, by default, serves as her nurse) and Archie's decision therefore prevents the better off world from coming about for Betty. Therefore, Betty suffers a harm in Betty's Nurse. In the context of Betty's Hat, in contrast, the world in which Betty is better off (a world where Archie gives her the hat) is not similar to the relevant comparison world (because in that world Archie's default action is to *not* give her the hat) and therefore an intervention, on the part of Archie, was required to bring about the better off world for Betty. In Betty's Hat, therefore, Betty is not harmed, and Archie has only failed to benefit her.

[38] The notion of a 'nearest possible world' is another way of conceptualising a subject's counterfactual position, i.e. the position that the subject would have been in had a particular action occurred or not have occurred. A subject's counterfactual position can be likened to the 'nearest possible world' because it is meant to represent, like the nearest possible world, the real world most closely. In other words, both are taken to be symbolic of the state of affairs which would have existed had a certain act been or not been performed, with all other things being equal.

I find Klocksiem's solution to hold some promise. I also find that it accords with our intuition that omissions are only morally impermissible when there is something 'extra' such as a promise holding between friends. From a legal perspective, I would here also add the existence of a special relationship - for example, between doctors and patients, between parents and children and between police officers and civilians. When these extra contextual factors are at play, our intuitions regarding the difference between failures to benefit and harmful omissions do seem to differ significantly.

However, I also find Klocksiem's approach to be problematic for a variety of reasons. There is, firstly, the problem that in adding the requirement of extra contextual details, a purely objective counterfactual comparative account of harm is thereby abandoned in that we are now no longer only ascertaining the pure objective position or nearest possible world that would have occurred. Instead, we may be making a value judgment about what that nearest possible world *should* look like. In that way, his argument may undermine itself and show how pure counterfactual comparison alone cannot determine whether harm has or has not occurred. Secondly, it is often said that analyses of harm are supposed to be a-moral.[39] That is, whether or not a moral patient could be said to be harmed should not depend on the intentionality or fault of the moral agent. When we take into account, in our analyses of harm, aspects regarding intentionality such as broken promises, there might be an argument to be made that we are bringing fault, accountability and responsibility into the analysis and that our judgment is thereby being clouded by the fact that Archie has made a promise in Betty's Nurse that he has not made in Betty's Hat. It could be argued that Archie's promise should have "no impact on whether the harms inflicted are of equal size; [and that it should affect] only the blameworthiness of [Archie] or the wrongness of [his] actions" (Bradley 2012: 395). If we accept Klocksiem's argument, we may, therefore, be entering the realm of the *wrongfulness* of actions, rather than the *harmfulness* of actions. Arguably, actions must be harmful in order to be wrongful, but not the other way around. In other words, a particular act can be harmful to another person irrespective of whether or not the moral agent has acted with bad

[39] See, for instance, Bradley (2012: 395), in this regard.

intentions and thereby acted wrongly. The killing of a person, for example, can be harmful, irrespective of whether the actor acted with bad or good intent (for example in self defence).

Drawing on the above, it seems as though the omission / failure to benefit problem is once again a serious problem for the counterfactual comparative account of harm. Although both Hanna and Klocksiem must be credited for identifying the complexities within the problem that need further exposition, their solutions are found wanting. My own position on the omission / failure to benefit problem, which will be greater detailed in section 2.4.2 below, is that the purported ethical difference between the two is really more of a semantic difference than a real difference, with the implication that the omission / failure to benefit problem is not a real problem.

So far I have considered pre-emptive harms and the difference between omissions and failures to benefits in the context of the counterfactual comparative account. It was shown that in both contexts, the counterfactual comparative account of harm gives the wrong results, results which do not accord with our intuitions regarding harmfulness. In the next section I move to consider another context in which the counterfactual comparative account of harm gives the wrong result, that is, in the context of future persons who would not exist but for our harmful actions.

2.3.3 Future persons who would not exist but for our harmful actions

Our moral accountability towards future persons has been problematised by Parfit through his infamous non-identity problem. The non-identity problem has been widely discussed in philosophical discourse and arises in many contexts. It has been used, for example, to conceptualise our duties towards future people in the context of environmental ethics. Consider the example of ‘Risky Policy’ given by Parfit in this regard, summarised well by Bontly (2016: 1234):

> Suppose that, as a community, we have a choice between two energy policies [Risky Policy or Safe Policy]. Both would be completely safe for at least two centuries, but one would have certain risks for [future] people. If we choose Risky Policy, the standard of living would be slightly higher over the next two centuries. We do choose this policy. As a result, there is a [radiological] catastrophe two centuries later, which kills thousands of people.

According to Parfit, our decision to adopt Risky Policy does no harm to the future people that are killed two centuries later in the abovementioned scenario. This is because if we do the opposite and choose Safe Policy, then these particular future people who we are now considering as the subject of harm will never exist. In other words, if we today choose the Safe Policy then, because of the butterfly effect of human action, it is quite conceivable that very different people will exist two centuries later, than if we had chosen Risky Policy. Therefore, choosing Risky Policy actually enables the persons who later die in the catastrophe to exist. If we choose Safe Policy, these particular people will not exist. Our decision to choose Risky Policy therefore benefits these people rather than harms them because it causes them to exist.

In essence, the non-identity problem forces us to confront the following question. “Can an act harm someone - a future someone - if that person would never exist but for that very action?” (Bontly 2016: 1233). Recall that on the counterfactual comparative account of harm, “an action can harm someone only insofar as it is worse for her, and an action seemingly cannot be worse for someone if she would not exist without it” (Bontly 2016: 1233). Let us take another example, from within a biomedical context, to conceptualise this (Bradley 2012: 398):

> Mary’s Child:
> Suppose Mary is contemplating pregnancy. If she becomes pregnant now, she will conceive a child, Jane, who will have a painful disease. If she waits a few months to conceive, she will conceive a different child, John, who will not have that disease. In that case, Jane would never come into existence at all. Mary chooses to conceive Jane. Jane lives a good life on the whole, despite the pain that she endures from her disease; but due to all that pain, her life is much worse than the relatively pain free life John would have had if she had waited.

On Parfit's logic, Mary's decision cannot be said to have harmed Jane, because Mary's decision is a necessary condition for Jane's existence. Mary's decision causes Jane to exist with a good life on the whole and we therefore cannot morally criticise the decision as being harmful to Jane because Jane is happy, on balance, to have been born. Jane has therefore not been rendered any worse off by Mary's decision, given that an alternative choice would have resulted in Jane's non-existence.

From examples like Risky Policy and Mary's Child, Parfit wants to point out that a decision which seems to harm a future individual cannot be criticised on moral grounds when the very same decision which brings about the harm is linked to the existence of the particular future individual. More succinctly, "[t]he trouble appears when the very person an action would seem objectionably to harm ... would never exist if not for that action" (Parfit 1984: 357). This is notably the precise structure applicable in wrongful life cases, the action there being the negligent conduct of the medical practitioner. The person which the action would seem to harm (the disabled child) would not have existed if the medical practitioner had not acted precisely in the way in which he or she did. This is because the disabled child would have been aborted or not conceived and therefore would not have existed. According to Parfit's logic, we then cannot say that the medical practitioner's conduct was harmful to the wrongful life plaintiff, in that the medical practitioner did not cause the wrongful life plaintiff any harm. In fact, if we regard coming into existence with a life worth living to be a benefit, the medical practitioner's conduct seems to benefit the wrongful life plaintiff in that it puts him or her into a better position (existence) then he or she would otherwise have been (non-existence).

According to Woollard, "[i]t is because our behaviour does not make the future individual *worse off than they would otherwise have been* that it is suggested that we do not harm them" (2012: 681, own emphasis). The non-identity problem therefore seems to create a puzzle if we generally conceptualise harm as an objective worsening of a counterfactual position. I will later argue that this puzzle does not arise if we abandon the understanding that harm has to do with the objective worsening of a counterfactual position. For now, however, let us consider a possible solution from within the counterfactual comparative account.

It has been argued that the counterfactual comparative account of harm can accommodate the harm that Jane suffers in Mary's Child by again relying on the distinction between *pro-tanto* harm and all-things-considered harm (Bradley 2012: 406). The proposed solution here is that Jane does not suffer all-things-considered harm and only *pro-tanto* harm. I struggle to see how this solves anything. The non-identity problem arises specifically because of the divergence between our intuition that Jane was harmed and that, theoretically, Jane was not harmed because she was not made worse off. We therefore need a solution that accords with our intuition that Jane was harmed or that does justice to this intuition. A solution that relies on the fact that Jane was not harmed (because she was not all-things-considered harmed) or that Jane was partly harmed, is therefore not adequate. We need a solution that accords with our intuition that she was, in fact, harmed. It is also important to keep in mind that *overall harm* is what matters, both morally and legally. Both moral repugnance, as well as legal liability, arguably only attach to actions that cause harm to a person over-all.[40]

Let us take stock again. This chapter has so far looked at the problem that the counterfactual comparative account of harm is unable to account for our intuitions surrounding harmfulness. More specifically, it was shown that it cannot account for pre-emptive harms, it cannot clearly distinguish between omissions and mere failures to benefit, and it does not allow us to conclude that future persons whose existences are tied to our acts can also be harmed by those acts. At most, we can conclude that they have been partly harmed or harmed only in a respect, which does not do justice to our intuition that they are, in fact, harmed. In light of these considerations, I submit that the counterfactual comparative account of harm is extensionally inadequate in that it does not accord with our intuitions regarding certain instances of harm. It can therefore be said that the counterfactual comparative account does not adequately capture or adequately reflect what is intuitively harmful about harm. In light of this, the argument that the wrongful life plaintiff is not harmed (because he or she is not rendered any worse off) may be premised upon a flawed conception of harm. In the next section, I will attempt to show that harm is not actually about the objective worsening of counterfactual

[40] The surgery and rescue cases make this quite clear. The pro-tanto acts of the rescuer and the surgeon would attract no legal liability, nor any moral repugnance.

positions, but rather about imposing subjective experiential states which clash with the subject's will, and that the wrongful life plaintiff's harm can be accommodated in this way.

2.4 Non-comparative accounts of harm

Proponents who ascribe to a non-comparative understanding of harm generally understand harm in terms of non-comparatively harmful states. More specifically, on a non-comparative account, a state can be harmful for a person "regardless of whether a better state was ever a genuine alternative for [that person]" (Hanser 2008: 426). There is therefore no comparison with a prior state or with a state which could have been had things been otherwise. Gardner summarises this well in saying that non-comparative accounts of harm:

> ...hold that an event harms an individual *just in case it causes her to be in a bad state*, such that the state's badness does not derive from a comparison between that state and some alternative state that the individual would or could have been in (2015: 427, own emphasis).

In this section of the thesis, I will examine two accounts of non-comparative harm - that of Harman and that of Shiffrin. I will try to show that they improve upon the counterfactual comparative account of harm because they are able to get around at least two of the three problems levelled against the counterfactual comparative account. More specifically, I will argue that although these accounts may also fail to distinguish between harmful omissions and mere failures to benefit, they at least fare better in the contexts of pre-emptive harms and in the context of the non-identity problem. I will also argue that Shiffrin's non-comparative account offers better solutions when it comes to certain intuitive non-harms such as elected death, elected deformity and consented-to assault.

2.4.1 Harman's list of harmful states

Harman conceptualises harm in the form of a closed list of harmful states. There is no test for harm per se for Harman. There is only a list of harms such that if the conduct of person X results in person Y coming to be in any of the listed states, person Y has been harmed by person X. According to Harman, these states are necessarily limited to the following: "pain, mental or physical discomfort, disease, deformity, disability or death" (2009: 139). Therefore, in order to determine whether a person is harmed, we merely need to decide whether or not the person is caused to be in a state of pain, discomfort, disease, deformity, disability or death. If they are caused to be in any of the aforementioned states, they have been harmed, "even if the state is not worse for the victim than other states" (Gardner 2015: 430).

An advantage for Harman's account is that it seems to avoid the problems associated with pre-emptive harms. Recall the example of Batman's Heart Attack. On Harman's account, Batman is harmed because the heart attack causes Batman to die and death is a harmful state on Harman's account, therefore Batman is harmed by the heart attack. The fact that Batman would have been hit by a flaming cannonball moments after the heart attack is, therefore, neither here nor there. Similarly, in the case of Archie's Broken Legs, Archie is harmed by the broken legs which Veronica breaks because the result is that he suffers pain and physical discomfort, which is a harmful state on Harman's account. Again, the fact that Betty would have broken Archie's legs a moment after is neither here nor there.

Another advantage of Harman's non-comparative account of harm is that it may also get around the non-identity problem. Recall the example of Mary's Child. On Harman's account of harm, Mary has harmed Jane because her conduct causes Jane to be in a diseased state, irrespective of the fact that Jane would not have existed had Mary acted otherwise (Bradley 2012: 398). Similarly, in Risky Policy, the future people are harmed because their states of being accord with one or other of the harmful states in Harman's list. A radiological catastrophe would surely result in these people suffering pain and physical discomfort and they would ultimately have to face premature, unelected death. They are therefore harmed irrespective of the

fact that had we acted otherwise, they would not have existed and that they are, therefore, likely objectively better off rather than worse off.

Turning to the fine line between omissions and failures to benefit, however, it seems as though Harman's account cannot adequately demarcate the line between the two. Recall the example of One Hundred Dollars and Golf Clubs. In both instances, Batman's conduct does not directly cause Robin to be in a state of pain, mental or physical discomfort, disease, deformity, disability or death, and he is therefore not harmed. However, in Betty's Nurse, which we intuitively take to be a harmful omission rather than a failure to benefit, Betty is also not caused to be in a state of pain, mental or physical discomfort, disease, deformity, disability or death by the inaction of Archie either. In Betty's Nurse, therefore, Archie does not harm Betty, which I have argued is intuitively the wrong result.

Perhaps we could say that Betty is caused some form of mental distress and discomfort in Betty's Nurse while, in One Hundred Dollars and Golf Clubs, Robin is not. However, we can contextualise the two Robin examples to show that Robin is also caused mental distress. Suppose that Robin's family, unbeknownst to Robin, is being held captive. The captor presents Robin with a deal. He proposes that he will free Robin's family if Robin gives him one hundred dollars on the spot. Robin opens his wallet and sees that he only has fifty dollars and, as a result, becomes nervous and scared. Had Batman given Robin the hundred dollars, Robin would have had enough money to pay the captor. Batman's inaction or omission therefore harms Robin by causing him mental distress and discomfort. So again, as with the counterfactual comparative account, on Harman's account there is seemingly no way to make the morally relevant distinction between harmful omissions and mere failures to benefit, because both harmful omissions and failures to benefit can easily cause one of the harmful states part of Harman's list.

Is Harman's account, then, an improvement on the counterfactual comparative account of harm? Harman's non-comparative account of harm seems to get around at least two of the three problems which were levied against the counterfactual comparative account. It is therefore an improvement on the counterfactual comparative account. Harman's account does, however, also have some other

problems which bear mention. For example, Harman's account includes death as a necessarily harmful state. This means that when a person dies, he or she will always be said to be harmed.[41] I would argue that this does not accord with our intuitions regarding the harm in death. In some, albeit very rare, instances we generally regard death to be a benefit rather than a harm. Here I am referring to people who are living in intolerable suffering and pain with no hope of recovery. In such instances, death may come as a benefit rather than as a harm. Harman's account cannot accommodate this.

A different though related point can be made about deformity. On Harman's account, deformity is necessarily harmful. However, in many societies, deformity is seen as something positive, and even something to strive towards. For example, in some countries the practice of 'neck stretching' is a beauty ideal which gives women better marital prospects and therefore leads to better economic circumstances, despite causing physical deformities of the neck. There is also the fact that modest body modification is widely practiced in contemporary western culture. The example of ear lobe stretching makes this clear. Despite the fact that these are literally deformities of the ear, people choose them, and people enjoy them. In what way can we then say that these things are then harmful to them? On the contrary, I would argue that these things are not harmful, precisely because they are consented to.[42]

The examples of the non-harm in death and deformity lead me to question whether harm is perhaps more of a subjective phenomenon than we generally regard it to be. In fact, I would argue that the counterfactual comparative account of harm actually brings this to the fore anyway, contrary to what most counterfactual comparative harm theorists would admit. Suppose, for instance, that Robin and Archie both have a set of 100 stamps. Batman steals 50 stamps from each of them. In both instances Robin and Archie are worse off than they would otherwise have been because they

[41] This is the same result if one applies the counterfactual comparative account. If someone dies, they are moved into an objectively worse off position (non-existence) than they would have been in, objectively, had they not died (existence).

[42] Of course, there is the issue that consent is sometimes given under duress. It could for example be argued that the women who stretch their necks are not *really* consenting to the deformities but rather that society and an unrealistic beauty standard pressurises them into doing these things. Their consent is therefore perhaps not given in a free and voluntary way, but rather given under duress. The same might be said about cosmetic surgery in contemporary western culture.

each have 50 stamps less. However, suppose that Robin is an avid stamp collector whilst Archie has merely inherited an unwanted stamp collection from his grandfather. If this were the case then, intuitively, only Robin would be harmed, because only Robin would be *bothered* about his loss of the 50 stamps. Schramme summarises this well (2013: 86):

> We value different things ... Someone might lose a stamp from his collection and would be worse off than before, but might not be bothered about it at all. For someone else, this loss might be deemed a considerable worsening of his situation. Hence, *whether something is comparative harm seems to depend on subjective evaluations* (own emphasis).

Harman's account is therefore extensionally inadequate with respect to the possibility of non-harm in death and non-harm in deformity, thereby implying that her account does not take into account the subjective nature of harm. One can also think of numerous other instances of harm which are not on the list. In addition, the obvious major problem with Harman's account is that it is not a unified account of harm. Her account does not explain what unifies the items on her list. More specifically, it does not tell us *why* pain, physical and mental discomfort, disease, deformity, disability and death are all harmful to the subject. In other words, the account does not "explain what all harms have in common by locating a common core to them" and it therefore violates the unity principle as a core desideratum of a good account of harm (Bradley 2012: 395). In light of this problem, let us move on to consider another non-comparative account of harm which might provide the glue for the unification of the items on Harman's list, that is, an account which shows *why* all of these above-mentioned states might be harmful, without resorting to the fact that they make the subject objectively worse off.

2.4.2 Shiffrin's will-based account of harm

After noting the various problems that the counterfactual comparative account of harm runs into in the context of pre-emption and failures to benefit, Shiffrin comes to the following conclusion in one of her articles:

> These examples raise the question of why comparisons are salient. *What seems basic to the moral significance of harm is the condition that one is in, not the condition one was or otherwise could have been in.* One's broken limb [in the rescue case] will have a similar reason-requiring force whether or not it registers a comparative decline in one's condition. The concern is that even if modified comparative accounts can deliver the right answers in these cases, they will still be chasing after results. It will remain unclear why comparisons ought to be central to assessments of harm (Shiffrin 2012: 369, own emphasis).

Like Harman, Shiffrin advocates for a non-comparative account of harm. In her account, she also mentions potential examples of harmful states such as death, broken limbs, pain and disability, but her account is not necessarily limited to these states in the same way that Harman's account is (2012: 376). In this sense, Shiffrin's account of harm provides a test for harm, rather than a list of harms. Her test for harm is developed out of what she takes to be the commonality between harmful states. For Shiffrin, what all harmful states have in common is that they conflict with or usurp an individual's will (Gardner 2015: 432).

In order to understand how Shiffrin gets here, we need to first look at her discussion of the asymmetry between harms and benefits. According to Shiffrin, there exists a moral asymmetry between harms and benefits.[43] In the first place, harms and benefits have different reason-requiring justificatory force. In the case of the bestowal of a benefit, simple assent of the recipient is required, whereas in the case of the bestowal of a harm, something more is required in that the harm must be deserved, it must be necessary to vindicate a right, it must be necessary to avoid a greater harm or it must be consented to, in order to be morally permissible (2012: 362). In the second place, says Shiffrin, "it is often impermissible for a third party to impose a harm to secure an overall benefit for a nonconsenting agent but permissible and even reasonable for that agent to make the same decision for herself" (2012: 376). For example, it seems permissible for a surgeon to sever an unconscious person's arm in order to avoid the patient dying (thereby preventing a greater harm), whilst it does not seem equally permissible for a surgeon to sever an unconscious patient's arm in order to enhance memory, hearing or appearance

[43] Recall that on the counterfactual comparative account they are seen as symmetrical.

(thereby bestowing a benefit) (2012: 363). The proviso, however, is that in the latter case, the severing of the arm in order to bestow some kind of enhancement or benefit, is rendered permissible if the patient consents. This makes sense in the context of cosmetic plastic surgery. In the case of a nose job, for instance, a patient consents to the physical deformity of a broken nose, a crushed septum and the consequent pain in order to be benefitted by a more aesthetic appearance.

Based on these observations, Shiffrin concludes that "the relation of the [potentially harmful] condition to the will of the agent who endures it may play a more integral role than comparative, interest-based accounts assign it" (2012: 376). More particularly, Shiffrin argues that because consent authorises harm in instances where harm would usually be impermissible, this is evidence of the fact that agency and autonomy play important roles in our ascriptions of harm. Armed with this understanding, Shiffrin then moves to define harm as "a distinctive sort of frustration or impediment of the will or of the ability to exert and effect one's will" (2012: 383). Harm, for Shiffrin, therefore lies within the process of being subjectively frustrated or impeded in the exercise of one's autonomous will. More specifically, harm comes about by frustrating "an agent's efforts to exert her will to influence, adapt, manipulate, and conform her experience and environment to fit her will" (2012: 382).

Let us take a few examples to illustrate how this plays out. In the case of death, for instance, Shiffrin argues that unelected death interferes with the will of the subject in that "[b]y constraining the duration and contents of one's life, it forces a particular end to a person – making her passive with respect to that central aspect of her life..." (2012: 386). It is, however, important that she refers to *unelected* death and thereby acknowledges that in some instances, where death is elected, death can come as a benefit or at least as a non-harm to the subject, such as in consented to deaths in physician-assisted euthanasia. I noted that elected death presents a problem for Harman's account above. Shiffrin's account seems to overcome it.

In respect of pain, deformity, disability and disease, moreover, Shiffrin says that these conditions may have the effect that they "forcibly impose experiential states that clash with one's will … [as] … such conditions [may] significantly impede one's capacity to achieve substantial congruity between one's will and one's life" (2012:

396). Importantly, however, by acknowledging that these experiential states must be *forcibly imposed* to constitute harm, she allows for the fact that sometimes pain, deformity and disability and disease are not experienced as harms by the subject, that is, when they are consented to.

Consider the case of pain for example. We generally understand pain to forcibly impose an experiential state upon a subject which clashes with his or her will. Indeed, when I stub my toe on the doorway, I am generally enraged at the fact that a state of pain has been imposed upon me. But then how are we to understand those who are disposed to masochism and S&M? These people consent to pain and physical discomfort because they find these things pleasurable. On Shiffrin's account, they are therefore not harmed, because nothing usurps their wills. Instead, the seemingly harmful conduct becomes not harmful, precisely because the conduct actually accords with the subjects' wills. I believe this realisation actually accords with our intuitive understanding of harmfulness. A similar argument can be made about those who engage in painful contact sport such as boxing. Intuitively, we do not take these sports stars to be harmed by engaging in these sports; in fact we praise them and admire them for their strength and courage. A further similar argument can be made in the context of deformity and body modification, as discussed earlier under Harman's account. In light of these observations, it can be said that "whether something is a ... harm seems to depend on subjective evaluations" (Schramme 2013: 86). Shiffrin aptly summarises the abovementioned sentiments in the following way:

> ...harm brings about a cleavage between a person's life and her will. When she actively *decides* to undergo a harmful condition, that cleavage is partially or perhaps entirely bridged by the operation of her will and control. The active engagement and operation of her will, in taking on and endorsing the imposition of harm, changes the significance of the harm into more of that associated with a mere cost (1999: 130, own emphasis).

Turning to disability, consider the case of a young man, Bernard, who is a high school football star on track for a scholarship and a professional football career, and who believes that football gives his life meaning and purpose. It is quite conceivable

that if Bernard were to become a quadriplegic in a motor vehicle accident, his disability would have the effect that it would result in a substantial incongruity between his will (in wanting to be a professional football star) and his life (never being able to become a professional football star). His disability would therefore come to him as a harm. A similar process could take place in the context of a debilitating disease which has the effect that a person's goals and desires become unattainable. Again, should the person want to become disabled or want to contract the particular disease, they are not harmed, on Shiffrin's account.[44]

Besides the more serious cases of unelected death, pain, disability and disease, however, Shiffrin's account of harm can also explain why the interference with everyday common life projects or goals harm those affected. Recall the case of Alastair, discussed earlier, who has a small pension and decides to invest some of his funds to end up with more funds, but who inadvertently ends up investing them in an illegal 'Ponzi scheme' with a dishonest advisor. On Shiffrin's account, Alastair is harmed by the financial advisor, not because he moves into a worse off objective position than he would otherwise have been, but because the financial advisor's conduct causes a frustration or impediment of Alastair's will in wanting to secure a better financial future. This seems to better explain what is *harmful* about the harm that Alastair suffers.

Shiffrin's account therefore seems to deliver the right answers. However, does it also overcome the problems of pre-emptive harms, omissions and the non-identity problem? In the first place, in the context of pre-emptive harms, it allows us to conclude, as Harman's account also does and the counterfactual comparative account does not, that Batman is harmed by the heart attack and that Archie is harmed by having his legs broken. However, in contrast to Harman's account, Shiffrin's account has a stronger justificatory force for why this is so. Recall that for Harman, Batman is harmed by the heart attack because it causes death, which is a harmful state, and Archie is harmed by the broken legs because this causes

[44] A particularly interesting example in this regard is found in 'Body Integrity Identity Disorder'. This is a condition in which there is a 'mismatch' between a person's mental image of their body and their physical body that they perceive. As a consequence, some of these people have desires to have healthy limbs (which they regard as not belonging to or part of their bodies) amputated or even to have their spinal cords severed in order to become paraplegic. In other words, these persons want to become disabled.

disability and pain, which are harmful states. For Shiffrin, however, these things are harmful because they are states which Batman and Archie did not will for themselves. Batman did not will for himself a heart attack or death, and Archie did not will for himself broken legs. If they had willed these states, however, they would not be harmed, on Shiffrin's account. I agree with this implication. It seems clear to me that once a potentially harmful state or condition is willed, the state or condition is no longer harmful to the subject. The example of death makes this very clear. If I *want* to die, then my death comes to me as a benefit, rather than a harm. Similarly, if I want to engage in painful S&M activities, the pain is subjectively experienced as beneficial, rather than harmful.

How does Shiffrin's account fare in the context of the non-identity problem? Some argue that Shiffrin's account faces a major problem in this context. That is, that if harm has to do with the usurping of the will, then it seems as though persons or entities who at the time at which harmful conduct ensues do not have wills, cannot be harmed. Jane, in Mary's Child, for example, would probably not will upon herself a disability, but at the time at which Mary makes the decision to continue the pregnancy (when Jane is still in utero), Jane does not yet have a will with which Mary's decision could clash. Similarly, in Risky Policy, although these future persons would probably not will upon themselves a radiological catastrophe which would result in their premature and painful deaths, they do not yet exist and therefore do not have wills at the time at which the decision is made. Likewise, in the wrongful life action, the disabled child who is subsequently born does not have a will at the time at which the medical practitioner acts.

Many have argued that this is an insurmountable problem for Shiffrin's account of harm. In fact, Bradley argues that it has the result that it violates ontological neutrality, in that it only allows for certain kinds of beings (being conscious autonomous beings with wills) to be the victims of harms (2012: 400). Consider the cases of foetuses, neonates and infants, or adults who are unconscious or brain damaged. How might we conceptualise that an event has had the effect that it results in "a distinctive sort of frustration or impediment of the will or of the ability to exert and effect one's will" (2012: 383) in those cases?

One possible solution is that, in cases where the subjects of harm are unable to consent or unable to express their wills, we can rely on their hypothetical non-consent. In other words, one can say that Jane is harmed by being born in the diseased state (even though she does not have a will at the time that Mary makes the decision), and that future people are harmed in Risky Policy (even though they do not yet exist and therefore do not have wills), because *if they did have wills at the time at which the potentially harmful conduct ensues, they would have objected* (Rabenberg 2015: 4).

In fact, hypothetical postulations of the will are not uncommon in moral contexts. When we are faced with moral dilemmas in the context of incapacitated or unconscious persons, we generally act in accordance with our intuitive moral judgments on whether or not a particular person would consent to condition X or Y. Consider the scenario of a patient born with severe cognitive impairment and who is kept alive through a feeding tube. In such a scenario, our judgments on whether or not the patient would prefer to carry on living cannot be based on any previously expressed will. A decision that the patient is harmed by being kept alive through the artificial feeding tube can therefore only be based upon a hypothetical postulation of that patient's will, because there is no evidence of such a will. In other words, the decision is based upon a reasonable person standard because we have no knowledge of what the particular individual would or would not will for him or herself.

This is a similar approach, although very different in method, to the approach taken by Judge Ben-Porat in the case of the wrongful life action in *Zeitsov v Katz* mentioned in Chapter 1. Recall that Judge Ben-Porat's view was that in some instances, albeit very rare instances, it could be concluded that a disabled life is more harmful to its subject than not existing, if the *reasonable person* would deem it so. Judge Ben-Porat's suggestion is therefore that the reasonable person can represent the hypothetical postulation on whether a disabled neonate's life would be better or worse than not existing. In this way, we can hypothetically postulate whether or not a particular disabling condition is a condition that one would not will for him or herself.

Hypothetically postulating the will of another person who cannot communicate his or her will, however, makes me ethically uncomfortable. Moreover, and more importantly, if harm has to do with will-usurping experiential states that are imposed upon a person (which I have attempted to show above) then harm is necessarily subjective in nature and, therefore, harm must be subjectively experienced in order for it to be *harmful*. If this is true, then relying on hypothetical consent, in the absence of a previously expressed will, cannot adequately ground a claim that a person has or has not been harmed. Does this then imply, however, that all persons who are unable to express a will at the time at which the potentially harmful event occurs, cannot be harmed? According to Shiffrin, this is not necessarily the case. In this regard, Shiffrin explains that our actions can set into motion causal chains which result in *harm that occurs in the future*. That is, that harm can be retroactive in nature. She aptly describes this in the following way:

> If our actions now set into motion causal chains that will result in a right's being violated in the future, the action is, at best, morally problematic. That the effect is not imminent and the future rights holder is not present at the time of our action matters little. Immediacy carries little moral imperative (1999: 138).

Shiffrin draws on Feinberg's bomb example to explain this.[45] In the bomb example, Feinberg asks us to imagine that a person places a bomb inside a pre-school classroom and programs it to go off in seven years. As planned, the bomb goes off seven years later and kills a number of five-year old children. Here, it is natural that we should find the bomb planter's conduct to be harmful to the children who die seven years later, even though at the time that the bomb is planted (two years before their coming into existence), they did not yet exist and therefore did not have wills to be usurped. According to Shiffrin, this is because the bomb planter's conduct violates the rights of, and thereby harms, the children who will exist seven years later. More specifically, the action "sets into motion a chain of events that will lead to the violation of the rights that will come to be held" (1999: 137).

That there can be a time gap between the harmful event or the harmful act and the harmful felt effects or harmful consequences of that event is actually not that

[45] Feinberg 1984. *Harm to Others*: 97.

strange. This is the approach which was taken by the South African Supreme Court of Appeal in *RAF v Mtati*, discussed in Chapter 1. In that case, recall that a pregnant pedestrian was struck by a car and the child that was in utero at the time was subsequently born with brain damage. The Road Accident Fund argued that no harm could be done to a non-existent person. The court, however, took a different approach and ruled that there could be a time lapse between the harmful conduct (the conduct of the driver by driving into the pregnant pedestrian) and the injury which sets in as a result (the disability that the child suffers from). Therefore, although at the time that the conduct took place the child was not a 'person', the child became a 'person' upon being born alive, and it is at this juncture that the harm sets in. Similarly, we could say that in the case of Mary's Child, although Jane does not exist at the time that Mary makes her decision, she is harmed upon being born disabled *once the effects of her disability come to life and start to affect her*. Likewise, the future persons in Risky Policy *experience the harmful effects of the choice when the radiological catastrophe occurs*, not at the time that we as society members make the actual harmful choice.

I find Shiffrin's argument that harm can be retroactive in nature and that immediacy carries little moral imperative to be persuasive. I also think that if we acknowledge this, coupled with an acknowledgment that harm is subjective in nature, then the harm paradox within the wrongful life action is resolved. More specifically, if we say that harm is about subjective clashes of the will, *and* that the enquiry into whether or not the medical practitioner imposed upon the disabled child a condition which the particular child would not will for him or herself need not necessarily take place at the time at which the medical practitioner acts, then the wrongful life plaintiff can, in principle, be said to be harmed. The enquiry can take place once the disability arises, or even once the child expresses subjective disaffection as a result of the disability with which he or she was born. As mentioned, South African delictual law acknowledges this in any event.

One last problem, however, is that the abovementioned approach would only be available to those who are *able* to communicate that a harmful act has usurped their will. Those who are disabled to the extent that they cannot communicate this would have to follow a different route. His or her parents would have to bring a wrongful life

claim on his or her behalf and would have to rely on the hypothetical non-consent of the disabled child. As mentioned earlier, however, I find this approach problematic, and I, therefore, put forward that only those who are able to communicate that their disabilities clash with their wills should be able to claim via the wrongful life action. This, therefore, leaves those who are intellectually disabled to such an extent that communication is severely affected without any wrongful life remedy.[46] I pause here to note, however, that I find this to be a necessary limitation for the wrongful life action. In the first place, and as will become clear from a reading of Chapter 3, there is no uniform understanding of the nature of disability, and we can therefore never say for sure that disability as such is necessarily harmful. Instead, what we have is a mixed understanding wherein either the individual suffering aspect is emphasised (the medical model) or the social discrimination aspect is emphasised (the social model). In the second place, and more importantly, disabled people tend to view disability differently to the way that most able-bodied people do. It is, therefore, imperative that only a disabled person who *him - or herself* subjectively feels that their disability is harmful should have access to a wrongful life claim.

To summarise the above, it seems that Shiffrin's account, albeit with a little bit of extra work, can accommodate the non-identity problem. By acknowledging that harm can be retroactive and that the harmful felt effects of a harmful act can take place later, the harm suffered by a wrongful life plaintiff can therefore be acknowledged.

Turning lastly to the context of omissions and failures to benefit, Shiffrin's account seems to run into another hurdle and this time, it cannot be overcome. Recall the examples of One Hundred Dollars and Golf Clubs. The counterfactual comparative account has the effect that Robin is harmed in both One Hundred Dollars and in Golf Clubs because he is rendered worse off than he would have been had he received the money and the golf clubs. Intuitively, however, one would take Robin to have been deprived of a benefit only and thereby not harmed. On Harman's account, Robin is not harmed in either of these scenarios, because he is not placed into one of the states which are part of her list. However, as we saw, we can contextualise the examples in a way that Batman's omissions do come to Robin as harms. On both

[46] Although a wrongful birth claim would still be available to his or her parents.

accounts, therefore, there is seemingly no reliable way to distinguish between harmful omissions and mere failures to benefit.

How does Shiffrin's account fare? Upon a Shiffrinean reading of One Hundred Dollars and Golf Clubs, we may want to say that Robin has been harmed. This is because it could be argued that Robin would most definitely have wanted one hundred dollars and the golf clubs and would probably have willed those states for himself.[47] Therefore, he is harmed by Batman in Batman not giving him these things. Therefore, it seems that Shiffrin's account collapses the distinction between harmful omissions and failures to benefit, in the same way that the counterfactual comparative account and Harman's non-comparative account do as well. In light of this, it seems that the omission/failure to benefit problem is a serious problem for all three accounts.

The fact that the omission/failure to benefit problem is a serious problem for all three accounts of harm discussed in this chapter might also suggest something further regarding the relationship between harm and non-benefits in general. That is, that harm and non-benefits might only differ semantically, and not ethically.[48] This claim, of course, however, runs contrary to the generally accepted view which is that "[m]oral common sense holds that harming a person is a graver offence than merely failing to benefit him" (Purves 2019: 2629). My aforementioned claim, in the context of omissions and failures to benefit, therefore, leaves us with some open questions, which could be better explored in future research, but which I will briefly mention here.

Firstly, if there is no morally relevant distinction between harm and non-benefits, and failing to benefit can also constitute harm, could it be argued that there are actually moral obligations to *benefit* others? In fact this is not actually that strange. In the context of human enhancement, for example, some have argued that failing to enhance a person (i.e. failing to benefit that person) may actually constitute a harm

[47] We would have to rely, however, on some form of previously expressed will of Robin in order to ground such a claim.
[48] I mentioned, in section 2.3.2, that I would elaborate on this claim. That elaboration can be found here.

to that person.[49] Another example that comes to mind, from within the political or legal context, is that of affirmative action. The underlying premise of such a policy is that *failing to benefit* previously disadvantaged persons is a form of harm to those persons in that it perpetuates their socio-economic exclusion. Take the example of a trust fund which provides for bursaries for white students only. In such an example, it can be said that black students are indirectly harmed, and there are a host of regional legislative mechanisms, constitutional provisions and international law instruments which enforce the prevention of such harm.[50] However, if we analyse the 'harm' which befalls the black students who are denied access to the bursary scheme it really is more of a failing to benefit which takes place here. In other words, these students are denied something that would benefit them – that of affordable education. These examples show that moral obligations to enhance are quite real.

Secondly, if we then accept that moral obligations to benefit exist, what kinds of benefits should qualify as morally compelling action on the part of the moral agent? In other words, should a moral obligation to benefit be qualified? For example, perhaps a moral obligation to benefit could be qualified by saying that only benefits which are related to basic welfare (such as food and water) would qualify as compelling action. It seems morally imperative, for instance, that governments should be expected to ensure that their citizens have access to basic goods. The existence of social grants and government pensions, for instance, seems to affirm this. Another possible way in which a moral obligation to enhance could be qualified is by saying that only benefits which would enhance previously disadvantaged persons (such as in the example of affirmative action above) should morally compel an agent to act. These are open questions and open examples which may be interesting to take further in future research.

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[49] See S Hall. 2012. *Harm and Enhancement: Philosophical and Ethical Perspectives* (Doctoral Dissertation) for a persuasive argument regarding the moral obligation to enhance (i.e. the moral obligation to benefit).

[50] See, for instance, the South African case of *BOE Trust Ltd N.O and Others* 2013 (3) SA 236 (SCA), in this regard.

2.5 Concluding remarks

Let us take final stock. This chapter has looked at the concept of harm in moral theorising. We began by noting that the moral account of harm which underpins the legal account is the counterfactual comparative account. We then proceeded to examine this account and found it to be problematic in the context of pre-emptive harms, in the context of failures to benefits and omissions, and in the context of future persons who would not exist but for our harmful actions.

We then moved on to consider two non-comparative accounts of harm. Here, we found that with both non-comparative accounts, in contrast to comparative accounts, the pre-emption and non-identity problems do not arise. The non-comparative accounts are therefore an improvement on the counterfactual comparative account. We also found that Shiffrin's account provides us with a more adequate justification for *why* pre-emptive harms could still be harmful and for *why* future persons who would not exist but for our harmful acts could still be harmed by our actions. This is because harm comes about when it causes a situation that conflicts with one's will. I tried to show that this makes intuitive sense when we consider the non-harm in elected death and elected assault.

I also tried to show that the conflict with the will need not be immediate, such that persons who do not have fully developed wills at the time at which potentially harmful events occur can suffer harm after the fact. There can also be a time gap between the event that puts those effects into motion and the subjective effect on the subject's will. The harm paradox within the wrongful life action is thereby resolved and the act of the medical practitioner, in omitting to identity the disability, could easily come as a harm to the plaintiff if the specific plaintiff takes his or her disability to be a harmful condition which he or she would not consent to or would not will for him or herself.

When it came to omissions and failures to benefit, however, we found that none of the accounts on offer - being the counterfactual comparative account, Harman's account and Shiffrin's account - give us the right answers. I think this is precisely because of the fact that harm is necessarily more subjective than we take it to be.

Whether an event would come as a harm or a failure to benefit would seem to depend entirely upon the subject's will. If Robin, in Golf Clubs, was more like Alastair, the elderly gentleman in need of extra cash for retirement, we could say that Batman harms him by not giving him the extra cash. However, if Robin was a secret incessant gambler desperately trying to recover from his gambling addiction, then Batman neglecting to give him the extra cash would not be harmful to Batman. We have now also seen that this leads to interesting implications regarding the relationship between harm and benefit in general and that it also leaves open some interesting questions which could be taken up in future research.

Chapter 3: Disability and harmfulness

3.1 Introductory remarks

In this chapter of the thesis, I want to examine the ways in which disability may be a harmful state or condition.[51] However, and as argued in Chapter 2, a state or condition is only harmful to a subject, on my understanding, if the subject deems it to be harmful. Therefore, the question of whether disability is necessarily harmful can be seen as an ambiguous question, in that it does not qualify from whose perspective it should be answered from. In other words, when we are talking about one or other state being harmful, we also need to talk about *harmful for whom*, or from whose perspective? Taking this as a point of departure, we will see, in this chapter, that there are a myriad of approaches to the harmfulness or otherwise of disability. For instance, some view having a disability as a form of suffering that comes about as a result of individual functional deficiencies. On the other hand, some regard societal biases and attitudes towards disability as the cause of the suffering that disabled people experience and hold that there is therefore nothing inherently harmful about disability. There is also the fact that disabled people tend to view disability very differently to the way that most able-bodied people do. This is reflected in the fact that able-bodied persons generally express a preference towards their able-bodied-ness over being disabled, whilst disabled persons express a preference in favour of their disability. In light of all of this, this chapter is intended to be explorative rather than authoritative. In essence, I want to examine the ways in which disability might be harmful to its subject, which is not to say that disability is harmful as such.

In order to address the above, this chapter will proceed as follows. Firstly, I will begin with an examination of the way in which disability has traditionally been conceptualised, that is, from within the domain of the medical or biological model. It

[51] As mentioned in the introduction to this thesis, this question arises because it is implicit within my first research question surrounding the harm paradox within the wrongful life action. To emphasise, the question of whether a wrongful life plaintiff can be *harmed by coming into existence in a disabled state* presupposes that *being in a disabled state is harmful*. Naturally, a moral patient cannot be harmed by the conduct of a moral agent whose conduct has the effect that the moral patient moves into a particular state, if that state is not also harmful within itself.

will be seen that on this model, disability is conceptualised as a form of deficient human functioning and the harmful effects of disability are viewed as the inevitable outcome of biological impairment. Disability, as understood on this model, is furthermore necessarily or intrinsically a 'bad' thing and can, and should, be remedied through medical intervention.

Following this, I will then, turn to an examination of the social model of disability, which stands in direct contrast to the medical or biological model. Although there is much disagreement among proponents of the social model, the basic idea that they all ascribe to is that disability is not something bad in itself; rather, disability is socially constructed and a form of discrimination. Many disabled persons who follow the social model, for example, do not think of themselves as disabled but, rather, as 'differently-abled'. Leading on from this, it is argued that if social discrimination against disabled persons is removed, the lives of disabled persons would be easier, and the harmful aspects of disability would disappear. Thus, although disability is sometimes something 'bad' that disabled people experience, it can be changed or addressed on a collective societal level, and it is thus not something inevitably, inherently, or necessarily bad for the disabled individual.

Following this, I will then turn to examine some concrete ways in which it might be argued that a disabled state is a harmful state, whilst working from within both models of disability described above. I will adopt Harris' conceptualisation of a harmful or harmed condition here, that is, a condition which one has a strong rational preference not to be in.[52] This naturally follows from my understanding of harm as a subjective usurping of the will. Here I will turn to examine possible arguments for why a disabled state might be said to be a condition that one has a strong rational preference not to be in, and therefore something bad or harmful for the disabled person. I specifically look at three common arguments here. These are, firstly, that disability involves necessary suffering; secondly, that disability involves a lack of or decreased access to important qualia; and thirdly, that disability involves a lack of autonomy or decreased sense of personal agency.

[52] See Harris J, 1992. *Wonderwoman and Superman*. Oxford: Oxford University Press, and Harris, J. 2001. One Principle and Three Fallacies of Disability Studies. *Journal of Medical Ethics*, 27, 383-387.

Against this background of the different models of disability and the different ways in which disability can be seen as a harmful condition, I will then turn towards the question as to whether it is morally permissible to cause a disabled life, or to causally contribute to a disabled life (as in the case of the conduct at issue in the wrongful life action). This is important because even though disability might not necessarily be harmful for a particular disabled person, it may still be that *causing* the disability is what is harmful.

Before proceeding with all of the above, however, it would be wise to again pause and consider the value of an analysis or problematisation of the normative concept of disability. In this respect, Harris posits that "[t]he answer to the question 'what is disability' is of more than semantic importance" (2001: 383). Nathan and Brown (2018: 593) furthermore echo this by saying the following: "[u]nderstanding the nature of disability is of the utmost normative and practical significance .... [in order to] ensure equal opportunities, participation and flourishing ... for all citizens." More specifically, disability as such needs to be properly understood so as to pick out the correct ethical measures or tools to be employed in the context of disabled persons as a group. This will become especially evident in relation to the wrongful life action, as the action itself can be seen as one such ethical measure or tool, developed against the backdrop of a particular understanding of disability. For present purposes, it suffices to note that the action is specifically geared towards compensating a person for the fact that he or she has been caused to live a life in a disabled state. Depending upon the model of disability one follows, this compensation can be interpreted very differently.[53]

3.2 The traditional medical/biological model of disability

Let us then begin with the traditional model of disability. The traditional model of disability is rooted in the medical or biological approach, and adopts a biomedical definition of disability. In this regard, disability is viewed as "some sort of medically observable deviation from biomedical norms" or as a form of a-typical species functioning (Riddle 2013: 378). A-typical species functioning is something 'bad' when

[53] I will address this more clearly in section 4.1.2.

it deviates from the norm to such a degree that it is disadvantageous to the organism. For example, a person who is bound to a wheelchair cannot walk whereas the majority of the population can walk, and the person's a-typical functioning is therefore a disadvantage relative to the rest of the population. A disability is thus necessarily bad on this model, unless the disability produces some sort of advantage for the individual, relative to the rest of the population, in which case it would actually be an adaptive ability, rather than a disability.

Under this model, moreover, disability is viewed as an individual pathology, located within the disabled individual him or herself, and particularly within his or her own physical body (Riddel 2013: 378). Because of this, there is said to be a direct causal relationship between biological impairment and the functional limitation. Functional limitations (commonly referred to under this model as 'handicaps'), such as not being able to access a building on account of not being able to walk and thus being unable to ascend a staircase, are seen as the direct result or the inevitable outcome of the underlying biological impairment. Another way of saying this is that "*impairment* is the primary cause of social or personal limitation" (Nathan & Brown 2018: 594, own emphasis). McMichael, for instance, says that "*a physical handicap, of itself*, *constitutes an emotional hazard* and sooner or later will become an emotional challenge for both the child and his family" (1971: 15, own emphasis).

By this logic, furthermore, it can be said that the removal of functional limitations or 'handicaps' is to be done by removing or 'treating' the impairment itself. This is because impairments are viewed as properties of individuals and individual bodies, and "the problem of disability is seen as a problem of individuals, to be dealt with ... by medical cures and rehabilitations" (Amundson & Tresky 2007: 544). Disability is thus a medical condition, which has a medical remedy.

From the above, we can distil the following characteristics of the traditional model of disability. Firstly, disability is necessarily a bad or harmful thing for a disabled person because it results in unnatural or deviant human functioning which produces no advantage for the individual relative to the general population. Secondly, disability flows directly from the underlying impairment so that the impairment is necessarily the cause of what makes life bad or hard for disabled persons. Thirdly, the way to

address this is by 'fixing' the impairment through individual medical treatment in the form of medications, operations and rehabilitations, so as to restore or enable the 'normal' functioning of the individual as much as is physically possible.

3.3 The social model of disability

The social model of disability developed largely as a critical response to the traditional medical model. There are many versions of and progressive debates within the social model. Nevertheless; the common perspective shared by its proponents is that disability is not viewed as the direct consequence of impairment; rather, disability is seen as something which is socially constructed. "An impairment or abnormality [under the social model] is no less a social construction than a credit rating or income-tax bracket" (Allen 2005: 95). In this regard, disability is something we create or something we impose onto experience. In this way, and more specifically, disability, as a concept, becomes influenced by "social forces such as morally impermissible attitudes, neglect and architectural barriers, unfairly imposed on people with impairments" (Nathan & Brown 2018: 594).

Therefore, whilst the traditional model adopts an individual pathological approach, the social model adopts a social pathological approach and posits that limitations experienced by disabled persons are not caused by their individual physical impairments. Rather, they originate within the social context. The solution to eliminating the harmfulness which disabled people encounter in their everyday lives, moreover, is to eliminate discrimination in society and to adopt stringent accommodation measures so that every disabled person is able to flourish within the community. In other words, "impairment is not a problem, it is the way difference and impairment manifest themselves in our social institutions that results in a problem" (Riddel 2013: 378). In this regard, Alison Davis (a disability activist who also happens to have spina bifida) says the following:

> ... if I lived in a society where being in a wheelchair was no more remarkable than wearing glasses and *if the community was completely accepting and accessible*, my disability would be an inconvenience and not much more than that. *It is society which handicaps me*, far more seriously and completely than

> the fact that I have spina bifida (Davis 1989, cited in Newell 1999: 173-174, own emphasis).

On this model, therefore, disability is not defined in individual functional terms, but rather in terms of unfair social disadvantages and socially imposed restrictions of activity and autonomy, caused directly as a result of discrimination. From this we can deduce the following: whilst under the medical model impairments are *necessarily* a bad thing because they result in disadvantageous functional limitations, under the social model impairments are *conditionally* bad as the badness of disability comes only as a result of discrimination. In other words, impairments in and of themselves are neutral and only become negative if persons with impairments find themselves within a society which is discriminatory towards people with impairments.

An example can be used to illustrate this. Many deaf persons do not identify as being disabled, but rather as 'differently abled'. For some deaf persons "[d]eafness is not pathological, but merely another way of being normal" (Cooper 2007: 563). Deafness, on this understanding, is thus not a medical condition and it does not need to be cured.[54] Many deaf persons claim that although they do not utilise the 'normal' mode of communication, they still communicate and convey ideas in much the same way that hearing persons do, and that they merely utilise a different medium to do so. In fact, it is sometimes suggested that sign language is in some ways even superior to spoken language, which would mean that deafness becomes an adaptive ability. For example, it has been suggested that sign language is easier to use than oral language because less muscle control is required; that sign language conveys better information in terms of spatial relations; and that sign language is four-dimensional and therefore more expressive than oral language (Cooper 2007: 574).

Drawing on this, it might be ethically suspect to suggest that being deaf is something bad or harmful in itself. Might it not be that being deaf is merely another way of being in the world and that the only thing bad that deaf persons experience is discrimination and a social environment that does not accommodate them? In fact,

[54] In fact, many deaf persons who ascribe to the 'differently-abled' view argue that medical measures should be used to *enable* deaf couples to *create* deaf children.

examples of deviations from 'normalness' or from normal biological functioning in other contexts shows that deviations from normal biological functioning are not *necessarily* bad things. The example of homosexuality makes this clear. Homosexuality can be viewed as a form of a-typical species functioning, in the strict medical sense, but it can be argued that it is not a necessarily harmful state. The harm that befalls homosexual persons, on this understanding, comes about only as a result of discrimination on the basis of sexual orientation.[55]

The social model has been quite successful in addressing discrimination against disabled persons. However, there is a core criticism often levied against it. This is that the model underplays or neglects the impact of physical impairment when, in fact, it is an important aspect of many disabled persons' lives (Shakespeare 2013: 217). It is especially hard, for instance, to ignore the negative physical aspects of impairment for persons with degenerative diseases and constant pain. Addressing discrimination and increasing positive accommodation for a person in constant pain will not change the brute fact that the person is in constant physical pain. Related to this, the social model has often been interpreted as a rejection of medical prevention, medical cures and rehabilitation, because of the downplaying of physical impairment and the focus on the elimination of discrimination as the 'cure' (Shakespeare 2013: 218). It has also been argued that the social model has the implication that causing disability would not be wrong.

Let us take stock again. We started by examining the traditional medical or biological approach to understanding disability. In this context, we said that disability is understood to be a direct result of biological impairment and deficient human functioning. We then moved on to the social model and found that the social model questions this underlying causal relationship and deems it to be misconstrued. Instead, under the social model, disability is seen as a form of social construction

[55] For example, although homosexual men cannot have biological children in the 'normal' way that heterosexual men can, there are new technologies available, for example IVF, through which homosexual men can have biological children. These technologies, however, are extremely expensive. If these technologies were more readily available and accessible, homosexual men would have the same or at least near similar procreative opportunities that heterosexual men do. In this way, the biological difference between homosexual and heterosexual men in respect of procreation is not harmful itself. Rather, it is the difference in the accommodation given to homosexual and heterosexual men in respect of procreation which harms homosexual men.

and thus a result of discrimination. My initial question in this chapter of the thesis, furthermore, was whether it can be said that disability is a harmful condition to be in for its subject. On the traditional model, the answer seems to be in the affirmative, and a disabled state is seen as something inherently or necessarily bad that needs to be medically corrected or fixed. On the social model, however, the answer is a little trickier because of the complication of the impairment/disability dichotomy. What can be said, however, is that on the social model, disability is not seen as something intrinsically or necessarily bad. It is not bad to be born disabled on this view. It is, however, bad to be born disabled simpliciter if the society into which you are born is discriminatory against disabled persons and if the social environment is not accommodating.

I do not aim, in this chapter, to express any opinion on which model adequately captures the nature of disability. My own view is that both models have something important to say about disability and that disability has both biological and social aspects. I do, however, wish to examine how these different understandings of disability interact with the argument that disability is a harmful condition, to which we now turn. It should become evident that whether a particular disability could be considered harmful depends largely upon how a particular disability is conceptualised, and whether that conceptualisation is formed through the perspective of a disabled person or an able-bodied person.

3.3 Disability as a harmful condition

According to Harris, to be in a harmful condition is to be in a condition which one has a strong rational preference not to be in (Harris 2001: 384). This account also accords with my conception of harm, extrapolated in Chapter 2, wherein a subject is harmed if he or she is caused to be in a state which he or she would not will, i.e. a state which he or she has a preference not to be in. Armed now with the different ways in which disability is conceptualised within the different theoretical models, let us look at some concrete ways in which disability may be such a condition. I have chosen to examine three experiences associated with disability which are often used to argue that being disabled is a harmful thing, namely, suffering, the lack of or

limited range of access to qualia, and the lack of autonomy or personal agency. It is interesting to see how the medical model of disability and the social model of disability have completely different things to say about these three experiences.

3.3.1 Necessary suffering

It is common to ascribe to disability some notion of necessary suffering. Disability is generally "assumed to be ontologically intolerable, that is *inherently* negative" (Campbell 2005: 109). It is very common to hear things such as 'he *suffers* from spina bifida' or 'she *suffers* from epilepsy'. The argument that disability involves suffering is also often invoked as a justification for selective eugenic abortion based on the idea that preventing the amount of disabled births prevents suffering, and preventing suffering is morally desirable, and that therefore selective eugenic abortion is permissible (Edwards 2001: 380-381).

However, it is fairly uncertain how, precisely, we should understand the claim that disability involves necessary suffering. Edwards (2001: 381), for example, argues that if we conceptualise it as an empirical claim, then it may very well be false. This is because there are countless examples of persons with disabilities who claim that they lead happy and fulfilled lives and that if this is so, then disabled persons cannot be said to be suffering (2001: 381). Alison Davis, for instance reports the following in relation to her disability:

> Despite my disability and the gloomy predictions made by doctors at my birth, I am now leading a very full, happy and satisfied life by any standards. I am most definitely glad to be alive. …. [H]andicapped people are …. presumed by …. doctors, philosophers and Society in general to have the capacity only for being miserable… (Davis 1985: cited in Newell 1999: 173).

It seems, then, that if most or at least a large portion of disabled persons experience their lives in a similarly positive way to that of Alison Davis, then the argument that disability involves necessary suffering seems to be empirically false. The story, however, does not end there. Some have argued that these positive outlooks on life with disability, such as Davis', wherein a happy or excellent quality of life

notwithstanding a major impairment is reported, amount to unreliable adaptive preferences.

The idea of adaptive preferences is captured well in what is known as the 'fox and grapes' parable. The parable asks us to imagine a fox in search of some sweet grapes. The fox notices some grapes hanging from a tree but realises they are too far up for him to reach. "On realising he cannot reach the grapes he desires, the fox insists 'grapes are too sour for foxes', and he did not want them anyway" (Begon 2015: 243). The fox, however, "seems to be 'fooling himself': he has failed to acknowledge his limitations or recognise that the real reason he no longer prefers grapes does not concern their sourness", but rather the fact that he is unable to reach them (Begon 2015: 243).

In conditions of extreme hardship or deprivation sometimes individuals cope by forming a belief that their circumstances are 'not that bad' and sometimes even proclaim to prefer their circumstances to any 'normal' alternative (Begon 2015: 241). For example, in the case of Stockholm syndrome a kidnapped person sometimes develops a sense of trust and affection for his or her captor (Begon 2015 241). A similar process might be underway in 'battered wife' syndrome. It is thought that these sorts of adaptive preferences are irrational and unreliable.

It is sometimes argued that a similar mental process might be underway in people who report happy lives notwithstanding their disabilities. In one study, for instance, it was found that of the people with serious disabilities that were studied roughly 54% of these persons reported an excellent or at least good quality of life (Albrecht & Devlieger 1999: 981). These numbers compare starkly with a national survey conducted in the same year in which only 80-85% of *able-bodied* persons reported a satisfied life (Albrecht & Devlieger 1999: 981). In order to account for this "disability paradox" as they call it (because they find it strange that disabled persons experience their lives as enjoyable), the same authors conclude their study with the following:

> The high quality of life reported by many [disabled] respondents could be due to a 'secondary gain' which occurs when *individuals with impairments adapt to their*

> *new conditions and made sense of them*. Individuals who experience disability can find an enriched meaning in their lives *secondary to the disability condition*. In this study, secondary gains occurred when individuals used their disability condition and subsequent outcomes to reinterpret their lives and reconstitute personal meaning in their social roles (Albrecht & Devlieger 1999: 986, own emphasis).

In this way, disabled persons come to value their lives notwithstanding their impairments, by focusing on secondary gains which could not have been gained had they not been, or become, disabled. These secondary gains could consist, for example, of a resurgence of religious beliefs or a new-found talent for motivational speaking.

Elizabeth Barnes (2009) argues that ascribing unreliable adaptive preferences to disabled persons who are positive about their disabled condition is hopelessly inaccurate. On her account, moreover, there are two types of preferences, and only one type is adaptive and unreliable. On the one hand, there are preferences formed as a result of extrinsic social distortions, social wrongs or inter-personal moral-badness, which are all adaptive and unreliable (Barnes 2009: 13). For example, in the case of a kidnap victim, whose preference towards their kidnapper is formed in relation to an extrinsic or external social wrong that is imposed upon him or her. On the other hand, however, there are preferences formed by intrinsic influence, as a result of intrinsic facts surrounding who we are in and of ourselves – such as, for example, our sexuality. Disability falls into this second group according to Barnes. This is why we would judge a preference of a kidnap victim to be adaptive – "since they prefer something that arose from unjust, agent-caused influences – whilst our preferences for our sex or sexuality are reliable – even if being female or homosexual makes our life more difficult or 'worse'" (Begon 2015: 249-250). Barnes therefore argues that the perspectives of disabled persons in relation to their disabilities are similar to the perspectives of persons formed in relation to their sexuality. In this regard she says: "That a person has a disability is a fact about herself, rather than social distortion... a way a person is in and of themselves" (Barnes, cited in Begon 2015: 250). On Barnes' view then, we cannot describe the views of disabled persons who claim to experience happiness and joy

notwithstanding their disabilities as being unreliable or false, and that they are therefore actually empirically true.

Based on the aforegoing discussion, it is arguable that the quality of life of disabled persons is judged differently by non-disabled people and disabled people (or non-disabled people who are disability activists and share the sentiments of disabled persons, such as Barnes). This leads one to question whether the necessary suffering claim often made about disabled persons is perhaps formed in relation to a prejudice or bias towards disabled persons. Saxton, who herself has spina bifida, notes in this regard that those that ascribe a poor quality of life to disabled persons generally also ascribe to the medical model of disability. The medical viewpoint in respect of disability, however, is biased against disabled people, according to Saxton, and therefore those that ascribe to it view disability disproportionately negatively. In this regard, she says that "the medical system tends to underestimate the functional abilities and overestimate the 'burden' and suffering of people with these conditions" (2013: 92). According to her, this is generally because medical practitioners seem to:

> …have a distorted picture of the lives of disabled people. They encounter disabled persons having health problems, complicated by the stress of a marginalized life ... but because of their training, the doctors tend to project the individual's overall struggle onto the disability as the 'cause' of distress. Most doctors have few opportunities to see ordinary disabled individuals living in their communities among friends and family (2013: 92).

Ho echoes these sentiments in noting that:

> ...many in medicine and bioethics continue to dismiss or discredit [the positive disabled] experience as subjective, mistaken, or simply [the] result of the lowered expectations due to disabilities. Moreover, biomedical and bioethical approaches generally [assume] that ... those who lack the 'normal' opportunity range cannot have a high quality of life ... Available information regarding the quality of life of people living with impairments and medical descriptions of various conditions and experiences are generally one-sided, selectively representing these conditions in static, absolute, negative, and stereotypical terms (2008: 198).

According to Saxton, not only does the medical system distort the lived reality of disabled lives, but so does the media. In this regard, she says that the media and "especially the movies, distort our lives by using disability as a metaphor for evil, impotence, eternal dependence, or tragedy..." (2013: 91).

Saxton holds that these are all deeply biased distortions of disabled lives and are not empirically accurate. If we listen to those who are living with disabilities, the picture is quite different. It is also noteworthy, for instance, that many non-disabled people who subsequently become disabled later in life tend to change their initial negative outlooks on disability and instead express sentiments of positive value towards their lives. Moreover, families who have disabled children and "who are familiar with the actual impact of the disabilities tend not to seek [the related genetic] tests for subsequent children" (2013: 93). It is for these reasons that Saxton says that suffering claims should be evaluated only from within the disabled community and from the perspective of people who are actually disabled.

Lastly, it bears mention that there is great variation in the amount of suffering that one might potentially experience as a result of different kinds of disabilities. Some disabilities seem to be accompanied by more suffering than others. Tay Sachs, for example, is a serious and fatal disease accompanied by characteristics such as the loss of motor skills, seizures, intellectual disability and paralysis, and death usually occurs by age four. It can be said that such a disease would probably be accompanied by great distress and suffering. However, besides these 'serious' disabilities, there are also disabilities which are less serious. Short-sightedness is probably a good example. I doubt that people who are short-sighted would regard their lives as involving intolerable suffering.

To conclude this section, it can be said that the claim that disability involves necessary suffering should not be uncritically accepted. Rather, we saw that as an empirical claim it may very well be false. Furthermore, it also seems that we cannot make any general claims regarding suffering involved in disability as such because there is great variation in disability and because some disabilities seem less tolerable than others. To problematise this even further, it also seems that whether a particular disability involves some measure of suffering depends very much upon the viewpoint

of the person who has the particular disability, as well as on which viewpoint, being either a medical or a social viewpoint, one adopts in respect of his or her disability.

3.3.2 Access to qualia

It is often argued that disabled persons may lack or have a reduced access to certain important qualia, which has the effect that disability is harmful. Harris, for example, says that the harm in disability arises as the result of "the deprivation of worthwhile experience" (2000: 98). "Deaf people [for instance] are denied the world of sound, music and the most fundamental form of human communication" (Savulescu 2002: 771). Similarly, people who have no hands are unable to touch and feel the texture of a velvet pillow and people who are unable to smell are unable to experience the sweet floral smell of a fleshly picked rose. In respect of children with Cerebral Palsy, for example, McMichael (1971: 56) says the following:

> Cerebral Palsy in particular precludes children ... from participating in a normal range of childhood experiences. Their inability to go shopping, help with the cooking, or to play normally with other children puts them at a disadvantage, *which is often compounded by defects of speech or hearing which [inhibit] them from asking the questions by which a child extends his knowledge of the world around him* (own emphasis).

There are actually two claims being made here. The first claim, which is perhaps less strong, is that disabled persons "miss out on certain qualia that others find intensely pleasurable" and that this is therefore bad because being unable to access things that are pleasurable is bad (Cooper 2007: 570). McMahan (2005: 77), for instance, describes this well by noting that "[t]he lack of an ability that is instrumentally valuable to those who have it is, in general, an obstacle to the achievement of the full range of goods characteristic to human life." The second claim, which I believe is a stronger claim, is that disabled persons miss out on or have a reduced access to certain qualia which are vital, not for pleasure, but for survival, essential functioning and normal everyday life. McMichael's claim above, for example, emphasises this aspect. For example, it may be harder for a blind person to cross the road by virtue of not being able to see, and it may be harder for a deaf person to note the danger of

a tsunami by not being able to hear the warning sirens by virtue of not being able to hear. It may also be harder for a disabled child with communication difficulties to make sense of his or her world and ask the necessary questions from other inhabitants of the world, as McMichael notes.

In response to these claims, disabled persons often invoke the 'differently abled' view of disability, which has developed out of the social model of disability and again as a critical reaction to the traditional medical model. This view of disability is sometimes termed the 'mere difference' view of disability. According to this view, being blind, being deaf, being unable to walk, or even being unable to do all three, are merely different ways of 'being in the world' and carry no intrinsic disadvantages, but are rather a neutral or "natural part of human diversity" and human variation (Barnes 2014: 88). This argument is often used by those in the deaf community.

It is also argued that many able-bodied or 'normal' persons miss out on or have a reduced access to important qualia anyway. For example, it can be said that some 'normal' able-bodied people who lack musical ability or have 'poor taste in music' lack important qualia (Edwards 2001: 382). Similarly, it can be said that although intellectually disabled persons might miss "out on those dimensions of experience which require considerable intellectual acumen, for example doing complex work in maths or even philosophy..., it may be said of those of average [or 'normal'] intelligence that they too miss out on such experiences" (Edwards 2001: 382).

This leads one to question whether having access to certain qualia is that paramount to living a fulfilled life. In fact, and as Cooper notes, it cannot necessarily be inferred that access to more qualia is a good thing and it cannot be inferred that all senses are necessarily good (2007: 571). She uses the example of smell and asks us to imagine a world in which air pollution is even more rampant than today and where the air pollution produces an immense stench. In such a world, according to Cooper, a person unable to smell "may come to be considered unusually fortunate" (2007: 571). Under the traditional or medical model of disability, furthermore, we might say that the disability becomes an advantage relative to the rest of the population, and in that sense is no longer something 'bad' for the individual and therefore no longer a disability, but rather an adaptive ability.

Cooper also argues, moreover, that in some instances where a certain quale is lacking, disabled persons are able to develop an additional quale which non-disabled persons have no access to. For example, deaf persons have been argued to be more sensitive to vibrations and visual stimuli than people who are able to hear (2007: 571). In this way, "[a] single disability [for example, deafness] may seem neutral because it can be compensated for by other abilities that develop to fulfil its functions" (McMahan 2005: 96). McMahan, however, argues that the development of additional compensatory abilities cannot neutralise what is 'bad' about disability because if disabilities are individually neutralised in this way then they should also be neutral in combination, which, he says, they are not (McMahan 2005: 96). In this regard, he says the following:

> If we consider why a number of different disabilities would in combination make a life worse, the explanation will appeal primarily to effects that each would have on its own but that cannot be adequately compensated for because of the presence of other disabilities. For example, the bad effects of blindness could not be adequately compensated for in the case of a person who was deaf and wholly paralyzed. In short, the bad effects of disability are largely additive (2005: 96).

There is an element of this that rings true for me. How might a person who is deaf, blind and completely paralysed develop compensatory access to an alternative quale by which to communicate? Seeing as they are deaf, they would be unable to respond to verbal stimuli but they would also not be able to become more responsive to visual stimuli by virtue of the fact that they are also blind. Seeing as they are furthermore completely paralysed, they would also have no use of their hands with which they could utilise sign language. In summary then, although it might be said that the lacking of important qualia is not necessarily disadvantageous, due to the fact that a person who is disabled in respect of one set of qualia can actually become 'more abled' in relation to other kinds of qualia, this becomes problematic in the case of persons who are disabled in relation to many different kinds of qualia. The 'differently abled' argument in this way only makes sense for persons with 'minor' or singular disabilities such as deafness or blindness, but not so much in the context of persons who have multiple disabilities, and therefore lack many or a variety of important kinds of qualia.

To conclude this section, I would, therefore, say that the lack of important qualia argument is strong when considering persons with multiple disabilities. In the context of persons with less severe or singular disabilities, however, the qualia argument makes less sense because if disabled persons can develop compensatory (or even better) access to qualia which are able to fulfil the functions of the absent ones, then a lack of the particular set of qualia cannot be harmful. This is, because the usurping of the will to access one set of qualia (for example, those that facilitate the will to communicate) seems to be attenuated or accommodated by having access to other sets of qualia and, in that sense, the will to communicate is no longer usurped. Furthermore, there may be an argument to make that if society were more accommodating of people with disabilities and invested more social capital in additional means for blind persons to cross roads or for deaf persons to identify tsunami warning sirens, then the lack of qualia necessary for survival argument seems to fall away too.

3.3.3 Autonomy and personal agency

The next argument which I want to address in this context is the argument that disabled persons lack the necessary autonomy or personal agency to be able to experience a fulfilled life.[56] The argument here is that many severely disabled persons are unable to autonomously engage with their environments and therefore lack the full capacity to pursue a decided-upon course of action in life and, therefore, lack a fully autonomous life and a reduced sense of personal agency. This discussion is also particularly relevant in light of my conceptualisation of harm as something which conflicts with one's autonomous will. What should become evident from the discussion below, however, is that a disability does not necessarily have the effect that it directly usurps a person's will and autonomy. On the contrary, sometimes this usurping of the will comes about when caregivers and other able-bodied members of society are unaccommodating and refuse to acknowledge the (albeit different) capacity of disabled persons to make autonomous choices.

[56] Here I have in mind the more 'extreme' or 'severe' forms of disability where persons are perhaps bed-bound and unable to function without the assistance of able-bodied persons. There are of course many disabilities where little to no assistance is required from others and where disabled persons can fulfil their everyday needs on their own. I, furthermore, note that there is an implicit problem here regarding how we are to draw the line between 'extreme' and mild or moderate disabilities.

One study, which examines disabilities of the hand in relation to autonomy, noted that "most movements in [activities of daily living] require object manipulation with a stable handgrip" and that the "[p]erformance of activities of daily living … is critical to ensure a full and autonomous life" (Gracia-Ibáñez et al 2018: 102). In this way, people with hand disabilities who are physically unable to grip objects may miss out on an important dimension of active human perception, being object manipulation[57], and this results in a loss of an important sense of autonomy. More specifically, if we understand autonomy, on the most rudimentary level, to mean one's ability to fulfil one's basic needs and desires, then not being able to grip an object, for example, a mug, so that one may take a drink of water on account of being very thirsty, can be seen as an illustration of a lack of autonomy because of an underlying disability. In this regard, recall the discussion in Chapter 2 in relation to Shiffrin's will-based approach to harm founded on the notion of autonomy. For Shiffrin, autonomy is related to the:

> …sheer exercise of agency – *in an agent's efforts to exert her will to influence, adapt, manipulate, and conform her experience and environment to fit her will*. The value of autonomous action lies both in the object of achieving harmony between the agent's will and the contents of her experience and environment, and in the means of its achievement – that this object is effectuated through the exertion of the agent's will (2012: 382, own emphasis).

A severely disabled person's exercise of agency is also further complicated by the fact that many disabled persons are physically dependent and reliant upon able-bodied persons to fulfil their everyday needs. The common image conjured up here is usually in relation to disabled persons who, as a result of their disability, are unable to move at all[58] or unable to move 'normally'[59], or in relation to disabled

[57] Object manipulation entails being able to actively engage with one's external environment and the objects encountered therein. Picking up a cup, kicking a ball or turning on the stove, for example, all involve a measure of object manipulation in that the objects within one's perceptual field are manipulated (i.e. they are acted upon other than by a natural environmental force such as wind) in order to achieve some goal.

[58] Such as, for example, cases of quadriplegia or cases of 'locked in syndrome' where persons can only, at most, move their eye muscles.

[59] Such as, for example, cases of paraplegia, spina bifida, cerebral palsy, multiple sclerosis and cases of missing limbs.

persons who, as a result of their disability, are unable to communicate.[60] To give an example in the case of persons who are unable to move, consider the following first-person account collected by Sullivan (2005: 32) upon interviewing a paraplegic person in a paraplegic clinic.

> … [T[hey laid me on pillows and there was a pillow to spare …. So they lifted me up and laid me again. And it ended up so that they had a bit of me on each of the pillows but it meant that I didn't have a pillow under my fracture side… [I]t was really, really painful. I said 'I don't think you've laid me right.' And they said 'Well, how would you know? You've just arrived here.' ... 'We've moved the team now and we have to do a full team lift, so you're stuck like that'. And it was really, really painful… And she said, 'Are you in pain?' And I said 'yes'. And she said 'That's good, because it means you've got feeling doesn't it?' and walked off. And I had to just lie there in agony until the afternoon shift came on.

In this example, the disabled person does not have the autonomous ability to relieve his pain on his own. He is completely dependent upon the health care worker to do this for him, but she dismisses his perception and his pain.

A preliminary initial objection to this argument that disabled persons are 'too dependent', is to say that all persons, including able-bodied persons, are dependent upon others anyway and in this way broaden the notion of dependency to include the able-bodied. It has been said, for instance, that complete autonomy and independence is in any event unattainable for any person, including non-disabled or 'normal' persons because dependence is 'part and parcel' of what it means to be a human being. More specifically, that;

> ...while most people do not need somebody else's assistance at all times, dependence is part of the human condition; it is mutual dependence that allows human beings to live in a society, to meet each other, to build relationships, to fall in love, and so on (Marzano-Parisoli 2001: 652).

Similarly, Ells (2001:603) says:

[60] Such as, for example, in cases of 'extreme' autism.

> We are all dependent upon others to help equip us with the basic provisions of a healthy and happy life (e.g., food, shelter, electricity, potable water, affection, and so on), but these dependencies usually go unnoticed.

In this regard, it is also noteworthy that during the continuum of life, we all necessarily go through key time periods wherein we are very dependant and reliant upon other persons. This is especially so during the beginning stages of life when we are babies and infants, unable to fend for ourselves without the help of others. It is also especially prevalent during the end stages of life when we might have to move over to assisted living or hospices, or, if we are lucky, where we might be taken care of by our family members.

Because of the fact that that some disabled persons are presumed to lack the ability for self-governance (i.e. the exercise and control over oneself), family members or caregivers often take it upon themselves to make the necessary decisions affecting disabled persons' lives. The disabled person is often assumed to be unable to do these things for themselves. Sometimes there is even also a questionable imposition of the will upon the disabled person, by a non-disabled person. Consider the following reports given by persons classified as intellectually disabled, noted by Björnsdóttir & Stefànsdóttir:

> Diana, a 30-year-old woman who lived with her parents described how they *made all decisions for her* and, for example, *decided what clothes she should wear, when she should go to bed, and what she should eat*, 'I think they do this out of love ... They want me to feel good in the morning when I wake up and when I go to bed and I just tell them OK but I do not go to sleep right away ... *I want to decide for myself when I am tired'* (2015: 12, own emphasis).

> Ari, a man in his 40s, shared an apartment with two other disabled men. He *neither chose to live with them nor chose to live in this particular place*: I used to live in a group home with four other people. *The staff* at the office [Municipal Service Centres] *decided I should live there* and also that I should live here. *They talked to my mother, but not to me* (2015: 13, own emphasis).

> Björn … is a young man also labelled as having profound intellectual and multiple disabilities. He was scheduled to sit on the toilet three times per day even though *he had communicated strongly that he did not want to* and it did not serve any purpose since he was unable to control his bowel movements. The staff told us that this had always been done this way and *they did not seem to* question these practices nor *perceive Björn's objections as important or relevant* (2015: 13, own emphasis).

The above examples illustrate how easily able-bodied persons disregard and dismiss the autonomous wills and desires of disabled persons. Diana, Ari and Björn in the above examples are assumed to lack the capacity to be able to decide when they are tired, what they would like to eat, where they should live and when to go to the loo, even though it is fairly evident from the above examples that they do have the capacity to decide these things. The problem is rather that their views are not taken seriously, which is, in itself, an infringement upon personal agency.

A different though related point can be found in the context of disabled persons who are not only not able to *do* what they would like to do, but also are unable to *say* what they want to say. In some cases wherein disabled persons are unable to communicate verbally, such as in the case of non-verbal autism, a process of facilitated communication is utilised. Facilitated communication "is a technique in which a facilitator holds the hand, wrist, elbow or shoulder of a person with a disability as s/he constructs messages on a keyboard or by pointing to letters on an alphabet display" (Erevelles 2005: 52). Facilitated communication techniques have been criticised to be inauthentic forms of authorship. This is because the product of the facilitated communication might have been unconsciously influenced by the facilitator and the product therefore might not be truly authored by the autistic person (Erevelles 2005: 55).

Let us again take stock. A lack of autonomy can come about for disabled persons, in light of the above discussion, in two respects. Firstly, because some disabilities have the consequence that they render the disabled person not able to do the simple things that he or she wants to do. This could be, for example, by not being able to change one's body position in order to alleviate a pain, or by not being able to grip a

mug so that one may take a drink of water on account of being thirsty. The second respect in which this comes about is in instances where caregivers or able-bodied persons in general impose their wills onto disabled persons and decide what is best for them. The harm of disability here is then imposed by caregivers (or the social environment) rather than innate to disability. This is especially so in cases of disabilities that are linked to a constrained, or lack of, ability to communicate, wherein the disabled person becomes subject to the wills and desires of the non-disabled persons whom they are in the care of.

It, therefore, seems as though a lack of autonomy may be an important foundation upon which to argue that a disabled condition is a condition which a person would have a strong rational preference not to want to be in. This argument, however, would apply more strongly in the context of extreme disabilities where people are heavily reliant on able-bodied persons or where they are unable to communicate their needs. Furthermore, it must be kept in mind that able-bodied persons may be guilty of not having an authentic listening ear when it comes to the wills and desires of disabled persons and that this may actually be harmful in itself. This brings us back to the social model of disability because it is seemingly then not coming into existence with a disability that is harmful, but a particular environment which is harmful, and this harm can be alleviated by altering the environment in accordance with the wills of the disabled persons who inhabit that environment.

To conclude our discussion on whether disability is a harmful condition, the following remarks bear mention. Firstly, we can never say that disability as such is a harmful condition. This is because not all disabled persons view their disabilities as a form of suffering; because a lack of qualia is not necessarily experienced as harmful and can often be compensated for; and because disabled persons do not necessarily lack autonomy because of their disabilities as such, but perhaps rather because able-bodied persons impose their wills onto their lives. In light of this, whether a particular disability could be considered harmful is largely a function of the interaction between the physical impairment, the social environment and, most importantly, the subjective experience of the disabled person him or herself.

3.4 The moral permissibility of causing disability

The above discussion has dealt with some concrete ways in which disability may be thought to be harmful to a disabled person, in the context of suffering, qualia and autonomy, and, therefore, a harmful condition. It has become evident that able-bodied persons, who generally follow the medical model, conceptualise disabled persons as persons who necessarily suffer because of a lack of or reduction in access to qualia and personal autonomy. Many disabled persons, who generally follow a social model, however, conceptualise themselves as persons who experience joy and happiness like able-bodied persons do, feel that they have a variety of ways in which to accommodate absent qualia, and hold that it is society that negatively impacts on their autonomy, rather than their physical disabilities. In light of this, whether a particular disability could be considered harmful depends largely upon the perspective from which one views the disability. The implication is that disability cannot be conceptualised as a *necessarily* harmful condition. Rather, it will only be harmful in particular instances – more specifically – in instances where the particular disabled person takes his or her disability to be harmful. If a wrongful life plaintiff does not take his or her disability, he or she cannot claim that they have been forced into a harmful condition. However, another way in which a wrongful life plaintiff could perhaps make a claim is by alleging that, although their disability is not harmful, the causing of the disability is what was harmful. In what follows, I will therefore look at the ways in which the causing of disability could be harmful, without presupposing that disability is a harmful condition.

There seems to be some disagreement among proponents of the 'mere-difference view' (the mere difference view is equivalent to the 'differently-abled view' in that both views do not regard disability to be inherently disadvantageous), however, on whether this is necessarily the case. There are those who, on the one hand, argue that there is nothing morally impermissible in causing disability. Many deaf parents, for instance, who want to have a deaf child, take this view.[61] Their argument is that there is nothing inherently disadvantageous in being deaf and that they should

[61] See Spriggs, M. 2002. Lesbian Couple Create a Child who is Deaf like Them. *Journal of Medical Ethics*, 28: 283-284 and Savulescu, J. 2002. Deaf Lesbians, 'Designer Disability,' and the Future of Medicine. *British Medical Journal*, 325, 771-773, for an exposition of such arguments.

therefore be allowed to select deaf embryos and purposively have deaf children when hearing children could be had. This I term the strong mere difference view.

On the other hand, there are those who ascribe to the weaker, mere-difference, view and argue that although disability is not something necessarily bad or harmful, it is still impermissible to *cause* disability. This view is sometimes said to encapsulate the following: that it is not disability that is harmful, but the *causing* of disability which is harmful and therefore morally impermissible. The logic of this position, however, has been criticised. It has been argued that by ascribing to the 'mere-difference' view of disability, one is also necessarily committed to the view that it would be permissible to cause a nondisabled person to become disabled and, by the same token, that it would be permissible to cause disability. According to some, however, ascribing to the 'mere-difference' view does not entail such a commitment. Barnes, for example, argues that one can adopt a disability positive position (and view disability as nonharmful) and simultaneously hold that it is morally impermissible to cause a disability (2014: 93-94). In order to show this, she appeals to a host of additional moral principles such as a lack of consent, wrongful imposition of transition costs and unjustified interference.

Consider the first moral principle she invokes, the lack of consent. Barnes asks us to imagine a scenario which she calls "Light Show", in which two persons, Amy and Ben, are playing around with lasers in a laboratory. Amy, by accident, points the laser into Ben's eye and he becomes permanently blind (Barnes 2014: 95). Now, if we adopt a mere-difference view of disability, it might seem that Amy has not harmed Ben because disability is then merely another way of being in the world and does not interfere with his well-being. However, Barnes argues, we can appeal to an extraneous principle of consent to show why Amy's action is harmful to Ben. In this regard she says that "[m]ost of us think you shouldn't go around making substantial changes to people's lives without their consent ...." (2014: 95).

A second principle which Barnes invokes to explain why Amy's action is harmful to Ben is the principle of transition costs. According to Barnes, even though disability is not a bad thing, Amy's action has the consequence that certain transition costs are imposed on Ben. These transition costs are imposed on Ben because Ben will have

to reshape his life around his new disability and this will inevitably be a difficult and painful process (2014: 96). In this way, "it is only *becoming* disabled and not *being* disabled that is bad" (McMahan 2005: 95).

Barnes anticipates that the notion of transition costs may not be applicable to cases wherein the moral patient inflicted with disability is a foetus, or where the moral patient inflicted with disability is an infant. Regarding the former, this is because "[a]daptation to the disability begins at birth .... [and] [t]he congenitally disabled do not ... form goals or embark on projects that are fundamentally incompatible with the limitations imposed by their disability" (McMahan 2005: 97). In respect of infants, all personal formative experiences presumably take place only towards the end stages of infancy, and therefore personal formative experiences will take place once already in the disabled state, and there is thus no transitory personal experience (2005: 97).

In response to these concerns, Barnes asks us here to imagine a woman, Cara, who decides to send her 6-month-old baby, Daisy, through a medical procedure which is intentionally aimed at making Daisy disabled, because Cara values disability (2014: 97). In this instance, Barnes says we can appeal to a principle of non-interference to justify why Cara's decision is wrong and harmful to Daisy. In this regard, she says that we generally ascribe to the belief that we should refrain from drastically altering a child's physical development.[62] From this, she generalises a wider principle of non-interference to which one can turn to show why Cara's decision is wrong, irrespective of the fact that no transition costs are imposed. She also notes that this principle of non-interference may be a wider principle which itself encapsulates the earlier consent argument, in that to do something to someone without their consent is to interfere with them. This is similar to Shiffrin's argument regarding harm.

The point of the above-mentioned arguments, for Barnes, is that "[t]here are plenty of cases in which we think it's impermissible to cause some feature *x* in another person (even a baby ...), although we by no means think it is suboptimal to be *x*" (2014: 99).

[62] Interestingly, this also seems to imply that it would be wrong to cure a genetic disability in a 6 month old infant, because we thereby also drastically alter his or her physical development.

How do Barnes' three principles (lack of consent, non-interference and transition costs) feature within a wrongful life context and the particular account of harm which has been developed in this thesis? Firstly, it may be noted that her first principle, a lack of consent, would be easily accommodated within the account of harm which has been developed in this thesis. More specifically, that if harm has to do with subjective usurpations of the will, then, by the same token, causing disability to a person who would not welcome that disability, would be to impose a condition which that person does not consent to. Therefore, even if a wrongful life plaintiff does not take his or her disability to be necessarily harmful, it could be that he or she did not consent to the condition being imposed upon him or her.

Regarding the third principle, the imposition of transition costs; it can also be accommodated within the account of harm developed in this thesis, with a little more conceptual work. The concern noted above, that infants who are born disabled start adapting to their disabilities at birth, and therefore cannot subjectively experience transition costs as harmful, could be dealt with by relying on the retroactive nature of harm. That is, that the harmful effects of the act need not be subjectively experienced at the time at which the act takes place, and that the effects of the transition can come as a harm at a later stage, once a fully fledged will has developed.

The second principle, non-interference, is difficult to accommodate within the harm of the wrongful life plaintiff, as developed in this thesis. This is because in the case of a wrongful life plaintiff, he or she *would have been born with the disability in any event*, and there is therefore no question of imposing a disability as such. More specifically, had the medical practitioner conducted the amniocentesis correctly and identified the disability, the result may be that the child's development is interfered with, in that he or she was *supposed to be* born disabled. In other words, if a natural process is about to turn an able-bodied person disabled, the principle of non-interference implies that we should do nothing (Kahane & Savulescu 2016: 780).

The point of the above discussion is to note that a disabled person who does not take his or her disability to be a harmful condition could still rely on an argument that the causing of his or her disability is what was harmful, by alleging that a condition

was imposed upon him or her which was not consented to or that the subjective effects of the transition into a disabled state were what was harmful. However, because the wrongful life plaintiff would have been born disabled in any event, reliance cannot be placed upon the principle of non-interference.

3.5 Concluding remarks

This chapter has attempted to problematise the question of whether disability is a harmful condition by addressing it from the perspective of the medical model (i.e. from the perspective of many able-bodied persons) as well as from the perspective of the social model. We first looked at the argument that disability might involve necessary suffering. Here we noted that as an empirical claim, it may be false. We also noted that the suffering argument is conceptualised very differently depending on whether one adopts a medical or social understanding of disability. If one adopts a medical understanding, suffering seems to be inherent in disability and can only be remedied by medical intervention and the restoration of normal human function. If one adopts a social understanding, however, suffering is seen as coming from a discriminatory and unaccommodating social environment and hence is not inherent in disability.

We then looked at the argument that disabled persons might lack or have a decreased access to important qualia but found that this argument again depends upon whether one adopts a medical or social viewpoint in respect of disability. It was also shown that disabled people are often able to develop compensatory qualia that can fulfil the function of absent ones in any event. The example of sign language used by the deaf community makes this clear. This is definitely a strong claim but it is less strong in the context of persons with multiple disabilities.

We then, lastly, proceeded to address whether disabled persons lack important aspects of autonomy or personal agency necessary for a full meaningful life. Here, we concluded that this may be the case, but again with the proviso that this would make more sense in the context of persons with extreme disabilities who are unable to communicate or who are completely reliant on able-bodied persons. We also

noted that able-bodied persons should be careful not to usurp the wills of disabled persons, thereby causing them harm in terms of the conceptualisation of harm that I argue for in this thesis.

In respect of an analysis of the medical and social models, I am inclined to think that they both have something important to say about disability. Whether a particular disability could be considered harmful would seem to depend on the interaction between the physical or mental impairment in question *as well as* the environment in which the disabled person with that particular impairment finds him or herself. Schramme summarises this well (2013: 86):

> ... [t]here can ... be pathological conditions that people are neutral about, such as being dyslexic in an environment where written communication is obsolete, or being short-sighted in a community that secures access to glasses or contact lenses. So the evaluative assessment of ... harm ... depends not only on our subjective preferences but also on the circumstances we live in, that is, whether a particular disease or disability poses a real disadvantage.

A deaf person, for example, who is able to utilise sign language in order to communicate and who is embedded within a community who utilises sign language, such that the person is not dependent upon other persons to enable his or her communication with others, would therefore not be in a harmful condition. At the same time, a person who is deaf and has no arms, and who therefore cannot communicate with sign language and would have to be assisted to communicate, would be in a harmful condition. In such a case, we might also conclude that this person would lack aspects of autonomy that are necessary for an autonomous and meaningful life.

Taking into account the above, it is pertinent to acknowledge that whether or not a particular disability is harmful depends on a myriad of things. Firstly, it would depend upon the particular physical nature of the impairment. Secondly, it would depend upon the environment in which the disabled person finds him - or herself. If the disabled person finds him - or herself in a socially accommodating environment and is given access to the same opportunities as able-bodied persons, their disability

would come to them more as an inconvenience than a harm. Thirdly, and most importantly, it would depend upon the way in which the disabled person him or herself *experiences* his or her disability. If the disabled person experiences relatively minimal harmful effects in respect of their disability, then, because harm is subjective according to the argument I have advanced in Chapter 2, they are not in a harmful condition *vis-á-vis* their disability. However, they could still make an argument that the *causing of the disability* was what was harmful (because it imposed an unconsented-to condition or an unwanted transition upon him or her) and that they have, on this basis, been harmed.

Chapter 4: Arguments from policy

4.1 Introductory remarks

The discussion in the preceding two chapters aimed to show two things. Firstly, Chapter 2 attempted to show that a disabled child who is born into a disabled state as a result of the negligence of a medical practitioner, and who would not have existed had the medical practitioner acted differently, can be said to have suffered harm, in principle. This is because harm, properly conceptualised, is a subjective phenomenon rather than an objective phenomenon, and because what is harmful about harmful states is not that they move the subject into an objectively worse position, but rather that they clash with the will of the subject. It was also shown that this clashing of the will need not be immediate, and that harm can actually be retroactive in nature, in that the harmful effects of harm can arise after the fact. Therefore, a person who is born disabled can be said to be harmed at a later stage once his or her will has developed. In light of this, the harm paradox within the wrongful life action is resolved, and the action becomes necessary to alleviate or address the very real harm which a wrongful life plaintiff may suffer.

In the second place, the discussion in Chapter 3 attempted to shed some light on the myriad of ways in which disability may be said to be a harmful condition. It was shown that there is vast disagreement regarding the phenomenon or concept of disability, and that depending upon one's viewpoint, disabling conditions are perceived very differently. For the wrongful life action to maintain its integrity, as a tool to address the harm of being disabled, it must therefore necessarily only be available to disabled people who take their disabilities to be harmful. In this way, a disability is taken to be harmful only from within the disabled community. An alternative way to show harm, without having to express disfavour towards being disabled, is to allege that the causing of a disabled condition is harmful in situations where the person did not consent to the condition or to the transitory effects of coming into that condition.

In light of the above, it can be concluded that the wrongful life action can be ethically desirable in light of the fact that it can be used to address or alleviate harm, but that it must of necessity be limited to plaintiffs who do, in fact, take their disabilities to be harmful, or at least the causing of their disabilities. One implication of this is that it may become a matter of moral luck whether the medical practitioner harms the disabled person. That is, if we accept that the harm depends upon the disabled person's subjective evaluation of his or her disability then the 'harm' cannot be predicted at the time that the possibly harmful event takes place. However, we could perhaps still say that the negligent medical practitioner acts wrongly by *risking* harm, even if no harm happens to result because the disabled person who comes to exist does not view their disability as harmful.

Having concluded, however, that the wrongful life action is an ethically useful tool which can be used to alleviate imposed harm, I turn now to consider whether the action also passes muster against certain policy arguments that have been levied against the action's ethical desirability. I will focus on two such policy arguments. These policy arguments are the most prevalent policy arguments against the action and, as such, have been mentioned in many of the legal cases which deal with the action. These are, firstly, the argument that permitting the action perpetuates discrimination against disabled persons and, secondly, the argument that the action might lead to a slippery slope whereby children who feel harmed by coming into existence may use the action against their parents, which would run counter to the right to procreative autonomy. In what follows, I will attempt to show that both arguments from policy fail and that, therefore, the action remains ethically desirable.

4.2 Discrimination against existent disabled persons

In this sub-section, I will examine whether the wrongful life action can be seen as unfairly discriminatory towards disabled persons. More particularly, I will consider whether permitting the wrongful life action expresses a state-sanctioned message that disabled lives are not worthwhile and consider whether this message has the capacity to negatively impact upon the lives of existent disabled persons by perpetuating their social inequality and discrimination against them. I will also

consider, in this section, the role of compensation in wrongful life actions and examine whether or not it addresses or perpetuates the aforementioned possible discrimination.

4.2.1 The expressivist objection

It is often argued that the wrongful life action, as an action based on *being born disabled*, has a discriminatory effect on the lives of existent disabled persons because it sends a negative message to them that their lives are not worthwhile. This message is argued to exact a heavy price and inflict an unfair burden on their psychological well-being (Hensel 2005: 144). A similar argument is made by opponents of selective abortion on the basis of disability.[63] The argument, in that context, is that by encouraging or allowing parents to abort in light of the presence of disabilities, decisions are being made about who should and who should not inhabit the world, and these decisions carry implicit discriminatory messages. Opponents of selective abortion have even gone so far as to argue that the ideology behind selective abortion is akin to that of the eugenics movement. The idea is that the same principles of selection and eradication of certain classes of people that were at play during the German Nazi regime are at play in selective abortion. As Hubbard notes,

> ...a similar eugenic ideology underlies what happened then and the techniques now being developed... Scientists and physicians ... are once more engaged in developing the means to decide what lives are worth living and who should and should not inhabit the world. Except that now they provide only the tools, while pregnant women themselves have to make the decisions ... (2013: 82).

The concern is, therefore, that in allowing selective abortion, the Disabled Person proper is selected and eradicated, just like the Jewish Person proper was selected for eradication in Nazi Germany. On the assumption of this linkage, the further

[63] See, for instance, Hubbard, R. 2013. Abortion and Disability: Who Should and Should not Inhabit the World? In Davis, L.J (ed) *The Disability Studies Reader*, Routledge: 74-86; and Asch, A. 2000. Why I haven't changed my mind about Prenatal Diagnosis. In Parens E & Asch A (eds) *Prenatal Testing and Disability Rights*. Washington: Georgetown University Press.

concern is that this sends a message that the Disabled Person proper should not inhabit the world, which in turn sends a negative message to disabled persons who do currently inhabit the world. The struggle faced by existent disabled persons in light of this negative message has been aptly described by Asch as follows:

> ...learning that the world one lives in considers it better to 'solve' problems of disability by prenatal detection and abortion, rather than by expending those resources in improving society so that everyone – including those people who have disabilities – could participate more easily, is demoralizing. It invalidates the effort to lead a life in an inhospitable world (2000: 240).

Let us take a closer look at the argument that selective abortion has the capacity to send a discriminatory message to existent disabled persons. Upon closer examination, it becomes evident that the argument rests upon another argument, that is, that disability is identity-constituting. In other words, the argument is "based on a view of the relationship between disability and identity which holds that disabling traits or disabilities can be identity constituting" (Edwards 2004: 418). Because disability is identity-constituting, when society sanctions selective abortion on the ground of disability, existent disabled persons are led to believe that *their* lives are similarly not worthwhile, or so the argument goes.

The counter argument to this is known as the contingency view, which is based on the idea that "reducing the incidence of disabling traits no more sends a negative message to disabled people than reducing the incidence of flu sends a negative message to flu sufferers" (Edwards 2004: 418). This view is typical of those who follow the medical model of disability. Those who follow the contingency view take disability to be contingent to a person's identity, in the same way that flu is contingent to a person's identity. Harris, for instance, takes this position (2000: 96). According to Harris, selective abortion is no different, in principle, to finding a vaccine to eradicate flu.

A critical question is therefore whether or not disability is an identity-constituting characteristic, in the same way that other characteristics such as gender and race are, or whether it is a contingent trait carried by its host like a mere flu or virus. I

would argue that disability is indeed something that is identity determining. As noted by Schramme, "[d]isability is different from a passing disease. It is a condition a person was born with or will be in for a long time, maybe the rest of her life" (2013: 88). It is furthermore evident that we categorise and perceive people by means of the categories of race, gender and disability (and probably in that exact order). It is common to describe person X as 'the black guy in a wheelchair' or 'that white girl with the thick black glasses'.[64] And of course, the way we cut up or perceive the world reflects, in turn, the way in which we cut up or perceive ourselves. More specifically, how we perceive the world has a direct effect on how we perceive ourselves.

If this is true, and disability is identity-constituting, then it is understandable that disabled persons would interpret selective abortion as an attack on their very identity. In the same way, says Hubbard, in relation to race, "[m]ost of us would be horrified if a scientist offered to develop a test to diagnose skin colour prenatally so as to enable racially mixed people ... to have light-skinned children" thereby eliminating dark skinned children (2013: 74). Black people would most definitely interpret this as an attack on their very identity. Selective abortion is argued to have the same effect on disabled persons.

Turning now to the wrongful life action, although it does not involve any actual medical procedure whereby a disabled foetus is selected for abortion, the action itself is *premised* upon such a selective abortion. The action only arises because the parents were deprived of their right to abort the child had they known of the disability. Recall the example of Jim's parents in the introduction to this thesis who proceeded with an amniocentesis on the presupposition that they would abort should the foetus have any disability. In light of this, it is therefore quite clear why selective abortion opponents would likewise be opposed to wrongful life actions. The message that disabled persons should not inhabit the world comes through in a similar way in the wrongful life action as it does in selective abortion on the basis of disability. As Saxton notes, the sentiment of wrongful life actions is that it is "'[t]oo bad that baby with *x* disease didn't get caught in prenatal screening'" (2013: 93).

[64] We tend to forget that poor vision is a form of disability.

In fact, some have argued that the message comes through more strongly in cases of wrongful life actions than in selective abortion. This is because in wrongful life actions, “the causal inquiry is ... not the prevention of a theoretical child with disabilities, but instead the active termination of a specific identified [foetus or child] with impairments” (Hensel 2005: 177). Furthermore, because the action is premised on the fact that the mother would have aborted, the mother must testify to this fact, and must thereby renounce the life of her disabled child. She must “disavow [her child’s] very existence in open court in order to secure financial assistance” (2005: 172). What is more, according to Hensel, “the disparagement is voiced from within the community of people with disabilities and [therefore] cannot be discounted by others as mere ignorance or prejudice” (2005: 173).

In contrast to the views presented above, there are those who argue that selective abortion on the basis of diseased and disabled traits (and, by the same token, the wrongful life action) does not carry with it a statement or message that the lives of existent disabled persons are not worthwhile, or at least does not translate into any morally repugnant treatment of existent disabled persons. Edwards, for example, argues that one can hold the view that selective abortion is morally permissible while also holding the view that existent disabled persons should be supported and treated with respect (2004: 419). In a similar vein, Savulescu argues that selecting against blindness or deafness “does not necessarily imply that the lives of those who now live with disability are less deserving of respect and are less valuable” (2001: 423). Savulescu notes in support of this that we generally attempt to prevent accidents in society which cause disability such as, for example, paraplegia as a result of motor vehicle accidents, and that our attempts in doing so are not generally regarded as statements that paraplegic persons deserve less respect than non-paraplegic persons (2001: 423). In Savulescu’s opinion:

> There are better ways to make statements about the equality of people with disability ... we could direct savings from selection against embryos/[foetuses] with genetic abnormalities to improving the well-being of existing people with disabilities... (2001: 424).

This last suggestion of Savulescu leads me to question how we should conceptualise the role and effect of compensation in the context of wrongful life actions, for this can also be seen as a mechanism for directing funding away from selection against disabled foetuses (i.e. the situation which would have occurred had the medical practitioner *not* acted negligently, identified the disability, with the result that the parents would have aborted) towards compensating disabled persons for being born disabled. Does awarding compensation to a disabled person for the fact that he or she was born improve or degrade his or her well-being? It seems, at least *prima facie*, that awarding compensation to a disabled person may improve the well-being of that disabled person. It is to this point which we now turn.

4.2.2 The effect of compensation

As mentioned in the introduction to this thesis, a wrongful life action is a delictual action that is part of the civil law and is concerned with the correction of a civil wrong and the awarding of monetary compensation to the injured or harmed party. If a wrongful life plaintiff is successful in his or her claim, he or she will be awarded compensation in the form of money.

In light of this consequence, it has been argued that the wrongful life action may, therefore, "seem therapeutically valuable to the [disabled] community because [it] provide[s] individuals with a consistent source of funding for the high cost of medical care that often accompanies severe impairments" (Hensel 2005: 171). The unfortunate reality of many disabled lives is that they carry with them financial burdens which non-disabled lives do not. Indeed, Shane Burcaw, the disabled YouTuber with SMA,[65] has to undergo periodical Spinraza injections to curb his muscle wasting and to prevent him from losing bodily strength as he ages. Some of his YouTube videos centre on his negative encounters with his health insurance on whether or not he qualifies for another Spinraza injection. Spinraza injections are estimated to cost 4 million dollars over a period of ten years (roughly 68 million rand). In light of these sorts of examples, it is often argued that "whatever the

[65] SMA is the abbreviated form of Spinal Muscular Atrophy. This is a disease which is caused by the loss of motor neurons and results in degenerative 'muscle wasting'.

intangible effects of [wrongful life] actions on the psyche and well-being of individuals with disabilities, there is a tangible need for money to secure the services that the litigants may desperately need" (Hensel 2005: 171).

As mentioned in Chapter 1, a similar argument was used in the *Kelly Molenaar* case in the Netherlands. The court there ruled that awarding damages for pecuniary loss in a wrongful life action would not lead to the conclusion that life with disabilities is worth less than life without disabilities. An award of damages, according to the court, merely serves to remedy the fact that disabled life does come with a unique set of challenges and that an award of pecuniary damages would enable a disabled child to improve his or her living conditions (Mukheibir 2005: 760).

Human and Mills make an even stronger claim that a compensatory award to a disabled person in a wrongful life action has the effect that it *affirms* the dignity of that disabled person and that in denying the wrongful life claim, "society is in fact renouncing [the disabled person's] right to dignity instead of protecting and promoting it" (2010: 86). This is because compensation sends a "message that the plaintiff is a worthwhile individual" whose particular needs are worthy of respect and concern (Hans 2017: 719). Shapira follows suit by stating that:

> ...compensating a handicapped newborn for a negligent, preconception diagnosis hardly implies that the disabled life of the infant plaintiff is devoid of all worth; *it is precisely because the plaintiff's handicapped life does deserve respect and compassion that he or she ought to be offered pecuniary redress* that is geared to ensure a decent, if hampered, life (1998: 372, own emphasis).

Compensation arguments based on dignity and respect, however, are deeply criticised by Hensel (2005: 171-177). Hensel argues that they are premised upon a medical interpretation of disability rather than a social interpretation and argues that this is deeply problematic. Recall that under the medical model or medical interpretation of disability, disability is viewed as an individual problem, and disabled persons' social and economic problems are seen as a direct result of their individual functional limitations, incapacity and dependence. The social model, on the other hand, views disability as a collective societal problem which can be solved by

deconstructing social biases and discrimination, increasing positive accommodation and promoting inclusivity and diversity. In light of this, Hensel argues that:

> …providing desirable assistance via wrongful life ... actions reflects the benevolent paternalism embedded in the medical model of disability, in which nondisabled persons 'assume the role of protectors, guides and spokespersons for disabled citizens without ever challenging the attitudinal discrimination' in society (2005: 171).

I disagree with Hensel's argument. Contrary to her, I submit that a monetary compensatory award is fully compatible with the mandate of affirming the dignity of disabled persons and that it is even compatible with the auspices of the social model, because it can be viewed as a form of positive accommodation.[66] As noted by Human and Mills (2010: 86), positive accommodation of disabled persons generally affirms their dignity precisely because it *acknowledges* their difference. When we build a wheelchair ramp for persons who cannot walk, for example, "society is not saying that that the lives of disabled persons have less value and that such persons must consequently use a different entrance to those that able persons use" (2010: 86). Instead, society is saying that people who deviate from the 'norm' also need to be respected and treated with equal concern. Similarly, when we allow students with learning difficulties to write their exams in separate venues, we are affirming the fact that their lives are accompanied by experiential aspects which are unique to their lives, and that these aspects need to be acknowledged and accommodated.

The crucial question, then, is whether it can be said that awarding compensation to disabled persons is a form of positive accommodation, in the same way that building a wheelchair ramp is, or in the same way that allowing students with learning difficulties to write their exams in a separate venue is. If this is true, then the wrongful life action seemingly becomes compatible with the social model of disability, contrary to what Hensel argues above.

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[66] At this juncture, the 'horizontal effect' of rights should be kept in mind. More specifically, that it is not only the state (being the collective representative of its citizens – or society) which has an obligation to respect and promote individual citizens' rights to equality and dignity. Individual citizens are also mandated to do this amongst each other.

As mentioned, the lives of disabled persons are often encumbered by financial strains as a result of their disability. This is the unfortunate reality. Take the example of Shane Burcaw above, whose life will forever be encumbered by expensive Spinraza injections. If we view his need for the expensive Spinraza injections (the absence of which would result in his body becoming weaker and his muscles wasting away) to be a basic need, then by forcing him to bear the financial burden of his basic need, we seem to be infringing upon his dignity, because dignity also entails living a socio-economically stable life.

The concept of dignity was eloquently set out in the case of *S v Makwanyane*[67] wherein it was said, in paragraph 328, that: "Recognising a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern". Such respect and concern, however, is not only in relation to personal autonomy and agency, but also "requires that we pay close attention to *conditions of material disadvantage* and its *impact on different groups in our society*" (Liebenberg 2005: 10, own emphasis).

The case of *Minister of Health v Treatment Action Campaign*,[68] for instance, makes Liebenberg's comment clear. In that case, the government was taken to task for not providing an anti-retroviral drug to HIV positive pregnant women for free, which would reduce the risk of HIV transmission between these pregnant women and their babies. The court found that: "For society to deny poor women and their newborns access to [the drug] would clearly indicate a lack of respect for their dignity as human beings entitled to be treated as worthy of respect and concern".[69] By the same token, forcing disabled persons who have unique and expensive medical needs to shoulder these needs themselves, may have the effect that they are not treated as worthy of respect and concern. On the other hand, by shifting this burden away from the disabled person to larger society, or to a wealthy insurance company which provides liability insurance to medical practitioners, we can positively accommodate these expensive medical needs, in the same way that a wheelchair ramp is built to accommodate the physical access needs of those who cannot walk at the expense

[67] 1995 (3) SA 391 (CC).
[68] 2002 (5) SA 721 (CC).
[69] Paragraph 73.

of the relevant institution or building owner. In light of this, the compensation element of the wrongful life action becomes a type of positive accommodation which affirms and promotes the dignity of people who are 'different' and have different needs. Drawing, furthermore, on the 'horizontal effect' of rights (in that rights are to be enforced between and amongst citizens, and not just against the state) we can say that the medical practitioner, being a citizen him or herself, is obligated to pay compensation to the disabled citizen who he or she has harmed, so that the disabled citizen's equality and dignity can be affirmed.

To conclude this section the following remarks bear mention. We started with an examination of the expressivist objection against wrongful life actions. We found this objection to hold weight because disability is unlike a passing illness and is, rather, something which is typically identity-constituting. However, we have now also found that compensation can actually affirm the dignity of disabled persons. We can therefore say that the negative effects occasioned by the concept of the wrongful life action on disabled persons' identities are offset by the compensation that follows. In light of this, the wrongful life action turns out to be a tool that addresses the economic discrimination suffered by disabled persons and thereby reaffirms their dignity as particular beings with particular needs. The policy argument that the wrongful life action would infringe the dignity of disabled persons and thereby discriminate against them thereby fails, even from the perspective of the social model.

4.3 Procreative autonomy and the harm of coming into existence

Another policy argument against the wrongful life action is that the action would lead to a slippery slope whereby children who feel harmed by coming into existence in X or Y condition would use the action against their parents. This concern also seems to follow quite strongly from the account of harm which I have developed in this thesis, being a subjective account of harm. There is, therefore, a fear that there might be "an avalanche of claims filed by handicapped children against their parents" (Ruda 2010: 227). If this were to happen, it is argued that the right to reproductive autonomy of parents would be infringed upon and that this is morally problematic.

The further (perhaps more serious) concern is that children could then, in principle, use the wrongful life action to claim not only in respect of intuitively harmful circumstances such as, for example, disease and disability but also intuitively less harmful circumstances such as, for example, sex, economic status or racial background which produce mere indirect disadvantages rather than direct harms. It is noteworthy in this regard that the first wrongful life action was brought against a father for allowing his child to be born as an 'illegitimate child'.[70] In other words, the concern is that children born into relatively good conditions may have a mechanism, through the wrongful life action, to claim against their parents for 'trivial harms'. The ethical concern is therefore summarily that:

> …one might seek damages for being born of a certain [colour], another because of race ... another for inheriting unfortunate family characteristics ... for being born into a large and destitute family ... [or] because a parent has an unsavoury reputation (*Zepeda v Zepeda*[71], cited in Raposo 2017: 343).

In this section of the Chapter, I will unpack this ethical concern. I will begin, firstly, by looking at the right to reproductive autonomy and the possible limits thereof. Here, I will try to show that the right is not absolute. In support of this, I will mention some moral principles that have been offered against full procreative autonomy; being the principle of parental responsibility and the principle of procreative beneficence. In this way, I will try to show that there are already certain procreative choices which we can criticise as morally wrong and, therefore, that procreative autonomy is not an absolute moral right, contrary to popular belief. I will then, secondly, move over to the anti-natal claim that *all* procreation is harmful. Here, I will try to show, however, that if we take seriously the claim that harm is subjective then it seems to imply that procreation is *not* inherently harmful. Rather, it only *risks* harm, in that children born as a result may subjectively feel harmed by their existence, but they also might not feel harmed by their existences. In this way, whether or not procreation causes harm becomes a matter of moral luck, in much the same way that it does in the case of a negligent medical practitioner who fails to identity a disability. I will then, lastly, move over to consider the implications of these claims for the wrongful life action,

[70] *Zepeda v Zepeda* 190 NE 2d 849 (Ill 1963).
[71] 190 NE 2d 849 (Ill 1963).

specifically in relation to the slippery slope argument. I will argue that there is indeed a risk that the slippery slope might transpire, but that moral agents ought to actually take seriously the claims of children who feel harmed by their existences – even if those claims are not based on facets of life which others, or most persons, find harmful and therefore trivial.

4.3.1 The limits to procreative autonomy

The right to procreative autonomy can be conceptualised as both a positive right and as a negative right. As a negative right, it enshrines the rights of all persons to bring into the world and rear their own children, that is, that *every* person should be able to have children and form a family, and that governments, as well as other citizens, should not interfere with this. In fact, this is codified into many international human rights law instruments. Linked to this is the argument that procreation is a fundamental form of bodily and personal autonomy as well as an instantiation of freedom of choice.[72] As a negative right, procreative autonomy also protects against *unwanted* procreation. Abortion rights in liberal democracies, for instance, protect procreative autonomy as a negative right. If one were to conceive of procreative autonomy as a positive right, on the other hand, this would entail a right to be assisted in reproduction or in avoiding reproduction (for example, state provision of services such as IVF on the one hand, or abortion and contraception on the other). In what follows, I will be concerned with procreative autonomy as a negative right, that is, the argument that all persons should be allowed to procreate and that limiting this right, which the wrongful life action might do, would be morally problematic. In this section of the chapter, I aim to investigate whether procreative autonomy is an absolute or inviolable moral right or whether it can be limited, and how we might justify that.[73]

First - the easy case, disease. It seems acceptable that a couple who both carry the gene for Huntington's disease or Tay Sach's disease should not procreate, at least

[72] Whether this autonomous choice also includes the right to choose a *particular* child, however, is less straightforward.

[73] It is also important to keep in mind, at this stage, that when I refer to procreation I mean to refer to all kinds of procreation, i.e. 'natural' or 'normal' procreation which results from sexual intercourse, as well as 'artificial' procreation which results from medical interventions such as IVF.

not the 'normal' or 'natural' way.[74] It seems acceptable that their procreation would be risky in respect of the child who may be born as a result. However, if we extrapolate the basis for this claim, being that the subsequent child may be harmed, we are forced to consider other facets of life, other than health, which make life more or less harmful. Socio-economic status, for example, is an interesting case. Would it be more ethical for a wealthy couple to have a child than a poor couple? Given that a wealthy couple could pay for better nutrition and education than a poor couple could, could we say that the procreative activities of poorer persons are more morally hazardous than the procreative activities of wealthy couples?[75] Similarly, given that only children born to heterosexual parents will have the benefit of both a 'mother' and a 'father', some argue (controversially) that it is more ethical for a heterosexual couple to have a child than a homosexual couple. These questions force us to consider the obligations of parents *vis a vis* their unborn children.

Steinbock and McClamrock, for instance, argue that all procreation should be guided by a moral principle of 'parental responsibility'. According to them, this principle entails not only that parents should be responsible for the maintenance and protection of their children, but also that they should actually be expected "to refrain from having children unless certain *minimal conditions* can be satisfied" (1994: 17, own emphasis). More specifically, the principle entails that:

> ...in deciding whether to have children, people should not only be concerned with their own interests in reproducing. They must think also, and perhaps primarily, of the welfare of the children they will bear (1994: 17).

One of the examples they use to explain this is that of so-called 'teenage pregnancy'. In this regard, they note that:

> …teenage mothers tend to have babies whose birthweight is low, a condition associated both with a significantly higher mortality rate than that of normal-sized babies and with learning disabilities in the future. Children of teenagers are also

[74] They could alternatively be allowed to procreate via artificial means and utilise some form of gene therapy.
[75] There may, however, be an argument to make that this would lead to indirect discrimination on the basis of, for example, race.

> unlikely to get adequate mothering, as their mothers are still children themselves (1994: 17).

They also mention that the principle entails "only that it is wrong to bring children into the world when there is good reason to think that their lives will be terrible" and not that "people should not have children unless conditions are ideal" (1994: 20). The difference between the two criteria, however, seems to be a matter of degree and, I would argue, depends largely upon one's own viewpoint.[76] Be that as it may, the principle of parental responsibility is one means by which we can limit procreative autonomy – in that persons should refrain from having children unless they can provide a minimally decent life for their offspring. I would think that we all generally assume some moral principle of this sort in decisions regarding procreation and that we only differ according to the way in which we conceptualise the concept of a minimally decent life.

What moral duties or responsibilities could parents have in cases of 'artificial' procreation? In cases of IVF, for example, where a host of embryos are grown in test tubes, do parents have any moral duties towards those embryos notwithstanding their procreative autonomy?[77] Savulescu, for instance, argues that couples are obliged to "select the child, of the possible children they could have, who is expected to have the best life" based on a principle of 'procreative beneficence' (2001: 415). Therefore, couples who undergo IVF and end up with a host of embryos are morally obliged to select the embryo which would have the best chance of life. Deciding not to test for genetic traits and leaving it up to chance is therefore morally problematic for Savulescu. Savulescu also argues that the principle of procreative beneficence applies not only in cases of diseased traits, but also in cases of non-diseased traits such as intelligence and memory. Parents can therefore be said to act wrongly towards their unborn children, on Savulescu's view, if they do not take active steps to ensure that their offspring have the best chance of a good life.

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[76] As I have argued throughout this thesis.
[77] The fact that we are dealing with embryos and not fully developed persons should not matter here, if we accept that harm can be retroactive, as I have argued.

The purpose of the above brief discussion, on the principles of 'parental responsibility' and 'procreative beneficence' is to show that there exist sophisticated moral arguments that show us that parents may have moral obligations towards their unborn children, in that they may be obliged to only bring into existence children who will live good or at least average lives. The thought that parents may have moral obligations towards their unborn children and that they could therefore be considered culpable or held liable for not taking active steps to ensure good or average lives for their offspring, is therefore not so strange.

We have also seen, in Chapter 2, that it does not matter much, from a moral perspective, that at the time at which the parents make the decision to procreate or initiate the process of procreation, the unborn child does not yet exist with a will that can be usurped. As I have tried to show, immediacy actually carries little moral imperative, and it is enough that actions set into motion causal chains which result in harm that occurs in the future. In this way, children can be harmed by being born, even if at the time they do not have wills with which the harm of coming into existence could conflict. Again, Shiffrin aptly describes it as such:

> Our moral duties emanate from the force these future rights exert on us now, not from any right predicated to be held by nonexistent persons. If our actions now set into motion causal chains that will result in a right's being violated in the future, the action is, at best, morally problematic. That the effect is not imminent and the future rights holder is not present at the time of our action matters little. Immediacy carries little moral imperative (1999: 138).

As also mentioned in Chapter 2, Shiffrin draws on Feinberg's bomb example to explain the retroactive nature of harm.[78] For Shiffrin, the action of the bomb planter "sets into motion a chain of events that will lead to the violation of the rights that will come to be held" (1999: 137). In the same way, says Shiffrin, procreation sets into motion a chain of events that will lead to the violation of the rights of the children who will exist as a result of that act of procreation. Therefore, it is not morally problematic that the child does not yet exist at the time of the act of procreation.

[78] Ferinberg 1984. *Harm to Others*. 97

To conclude this sub-section, the following remarks bear mention. Firstly, procreative autonomy is not absolute and it can be, and perhaps should be, limited by ethical principles in favour of ensuring that children are not harmed by being brought into existence. Secondly, parents have duties towards their unborn children to ensure that they do not cause their children harm, even though they do not yet exist at the time of the procreative act.

However, because harm is a subjective phenomenon, as I have argued in Chapters 2 and 3, the purpose of the above discussion is merely to highlight the basis upon which parents could be held morally culpable *vis-á-vis* their acts of procreation. That is, I do not want to prescribe a substantive content to the rights of children to be brought into a good or at least minimally decent existence. In other words, because harm is necessarily subjective (as I have argued), we can never say that persons who procreate under conditions X and Y which will result in condition X and Y in their child cause harm to their child. Whether that child is harmed will depend upon whether that particular child takes condition X and Y to have produced a harmful condition. In this way, whether procreative acts harm future resultant children again becomes a matter of moral luck.

4.3.2 Procreation as necessarily harmful

The above discussion has aimed to show that procreative autonomy is not absolute or inviolable, that is, that if children who are born as a result of their parents' procreative choices feel harmed by those choices, it is not enough to say that parents have a moral right to procreative autonomy. Rather, the harms that might result from such procreation need to be taken seriously – precisely because they may be conditions which conflict with the autonomous wills of these children. In this way, the matter becomes a clash of wills. That is, that the parents willed to procreate and rear a child, but the child who is born as a result may not will to exist, or will to exist in X or Y condition.

We, therefore, seem to have a pragmatic problem. If all harm is subjective, then how do we balance the harm of the child who feels harmed by having been born with the

harm that would befall the parents who want to have a child if they were not allowed to procreate? I would like to consider one way in which we may possibly get around such a problem. That is, by acknowledging certain moral presumptions, such as the presumption that coming into existence is *always or necessarily harmful* or at least *always or necessarily risky*. Shiffrin, for instance, argues that "procreation is a morally hazardous activity [and] in *all* cases ... imposes significant *risks* and *burdens* upon the children who result" (1999: 137, own emphasis). In her opinion, acts of procreation *always* have the potential to bring with them unconsented to harms. In this regard, she says that:

> By being caused to exist as persons, children are forced to assume moral agency, to face various demanding and sometimes wrenching moral questions ... They must endure the fairly substantial amount of pain, suffering, difficulty, significant disappointment, distress, and significant loss that occurs with a typical life. They must face and undergo the fear and harm of death. Finally, they must bear the results of imposed risks that their lives may go terribly wrong in a variety of ways (1999: 137).

In response to this, it is usually argued that although procreation necessarily imposes harms, it also necessarily imposes or results in benefits, i.e. the benefits of life. Because it simultaneously imposes benefits, it is usually argued that the child, who at the time cannot consent, would have consented were he or she able to. In other words, one could rely on hypothetical consent to justify the conduct of the parents in procreating by saying that existence necessarily imposes benefits which outweigh the harms of existence. In this way, the presumption is that every person wants to come into existence to receive these benefits and that procreation is therefore a morally innocent endeavour.

Perhaps, however, the presumption should work the other way around. In this regard, recall Shiffrin's distinction, mentioned in Chapter 2, between actions necessary to bestow a benefit and actions necessary to avert a harm. Recall that for Shiffrin, imposing a harm upon a non-consenting individual is only permissible if it is necessary to avoid a greater harm. In the case of procreation, however, says Shiffrin, "inaction may forego a benefit, the benefit of life, but there is no harm to

avert" (1999: 138). If there is no harm to avert, then the conduct cannot be justified on the basis of hypothetical consent because "it is impermissible for one to impose ... harm upon an unconsenting individual purely for the sake of granting that individual benefits" (Singh 2012: 104).

Shiffrin's argument is similar to David Benatar's anti-natal argument in substance in that they both rely on the asymmetry between harms and benefits. For Benatar (2006), coming into existence is always or necessarily harmful because it creates a situation whereby a person will have to endure the harms of existence. If that same person had not existed, he or she would only have been deprived of a benefit, which is less morally problematic than being harmed. Therefore, according to Benatar, procreation is always morally impermissible. Shiffrin makes a similar claim to Benatar, but her argument is built upon or grounded in the importance of consent and autonomy. That is, that it is only impermissible, according to Shiffrin, to impose harm purely for the sake of bestowing benefits on *unconsenting* individuals. For Benatar, by contrast, consenting to the harms of existence after the fact matters little and does not take away from the harm in coming into existence. In fact, Benatar argues that our consent is misguided in any event and amounts to a sort of unreliable adaptive preference similar to that which was discussed in Chapter 2 (Benatar 2006: 64-68). By contrast, on Shiffrin's account, if a person were to consent to their existence after the fact then they have suffered no harm, precisely because consent renders a potentially harmful event non-harmful on Shiffrin's account.

If we drive Shiffrin's argument to its ultimate conclusion, we can therefore say that Shiffrin does *not* actually ascribe to the argument that procreation is *always* immoral in the way that Benatar does. Rather, procreation is only immoral, on Shiffrin's account, if that procreation results in the existence of a person who takes his or her existence to be a harmful condition. Whether the parents' act of procreation causes harm to their child would depend upon the particular child's subjective evaluation of his or her existence. Therefore, whether acts of procreation harm resultant children again becomes a matter of moral luck in the same way that the negligent medical practitioner's act is a matter of moral luck. Procreation is therefore a morally risky or hazardous activity, but it is not *necessarily* harmful, and we therefore cannot apply a

presumption in favour of nonexistence, as Benatar does, if we take the subjective nature of harm seriously.

4.3.3 Implications

To summarise the discussion so far, the following remarks bear mentioning. We started out by noting that procreative autonomy is not absolute or inviolable. We also briefly touched on arguments in favour of moral duties for parents in relation to their unborn children. These are, for instance, that parents may have an obligation to provide a minimally decent life for their offspring, or that they may have an obligation to ensure that the child with the best chance of life comes into existence. We then looked at whether procreation might actually be inherently or necessarily harmful, as Benatar argues. Here, however, we found that the account of harm which I have developed throughout this thesis would never accord with such a position. That is, if harm is an entirely subjective matter, then there can be no such thing as a minimally decent life or, by the same token, a necessarily harmful life. This implies that children who are born into existences which most would take to be harmful are actually only harmed if the particular children themselves feel harmed by coming into existence. By the same token, children who are born into 'good lives' can still legitimately claim that they feel harmed by their existence, for all sorts of other reasons.

In light of the above, the concern that the wrongful life action may lead to a slippery slope in which children will utilise the action to claim against their parents for virtually any aspect of existence seems to be quite salient if we follow a subjective account of harm, such as that which I have advocated for in this thesis. My argument would seem to imply, for instance, that a child born of a particular race who feels harmed by being that particular race should have a valid claim against his or her parents. My argument therefore seems to 'fly in the face' of the commonly accepted view that people should accept their lot in life, or that persons should accept the unchangeable characteristics of their existence. In other words, my argument seems to imply that parents could be culpable *vis-á-vis* their children if they bring children into the world who take their existences to be harmful by virtue of certain unchangeable conditions of their existence. However, this also raises the further question of whether we ought

to actually take seriously *all* accusations or claims of harm, including the claims of adults who feel harmed by situations that most would not regard to be harmful. That is, are moral agents obliged to take seriously the moral patient's accusations of harm, even if other moral agents do not take the moral patient's ascription of harm to be genuinely harmful, or if the collective body of moral agents do not take that claim seriously? This can be conceptualised as the problem of 'trivial harms'.

For example, suppose that the entire world decides to ban the burka. Islamic women who protest in response will likely be met with the claim that banning the burka causes them no harm and that it actually benefits them. The arguments made in this thesis, however, imply that we harm these women if they subjectively feel harmed by the burka ban. That is, that even though the burka ban is meant to ensure what is generally considered to be an objectively better life for these women, it ends up causing them harm. The account of harm developed in this thesis would seem to imply that the harm claims of Islamic women in relation to a possible burka ban would need to be taken very seriously, even though it may seem to be a trivial harm to objective observers. In the same way, the claims of children who feel harmed by their existence, even though, objectively speaking, they may have been born into a 'good' existence, also need to be taken seriously by other moral agents, including their parents.

Some may find this untenable. Suppose, for example, that a child sues his or her middle-class parents on account of them not being wealthy enough and thereby putting him or her at a disadvantage compared to her rich peers. At first blush, this may seem absurd. But why does it sound absurd? In other words, what are the implicit arguments being made here? Firstly, there is the argument that the parents brought the child into existence, causing or allowing for him or her to experience the benefits of life, which outweigh the harms, and they therefore cannot be culpable. However, we have seen from the discussion in 4.3.2 that this argument fails. That is, because it is morally impermissible to impose harm upon an unconsenting individual purely for the sake of bestowing benefits. Parents are, therefore, perfectly capable of being conceptualised as culpable agents in respect of their children.

A possible second argument for why my argument may be untenable is that it would allow for unnecessary and emotionally-straining litigation within families. It may be difficult to conceptualise how these families would go from the court room back to their homes and carry on with their normal lives, after parents have been accused of having imposed harmful conditions on their children. I would like to suggest, in response to this concern, however, that this is not foreign territory. Custody disputes take place in a very similar context, and the possible harm experienced by existing in certain conditions is an issue before the court.

Continuing with an exposition of the practicalities of the arguments under consideration, I would like to mention one tentative suggestion for how litigation against parents could be limited. Recall Feinberg's distinction between different sorts of interests – such as welfare interests (such as food and water and other basic necessities) and ulterior interests (such as higher order life goals). Perhaps only subjective harms in respect of welfare interests should be taken seriously, and not harms in respect of ulterior interests. On this basis, the claim of the child that sues his or her middle-class parents on account of them not being wealthy enough, should, perhaps, only be taken seriously if it is based on a welfare interest (such as not having enough money to buy food with adequate nutrition) and not on an ulterior interest (such as not having enough money to go to the most expensive art school in satisfaction of a desire to become an artist).

To conclude, then, the concern that the wrongful life action would be utilised by persons or by children who feel harmed by certain conditions which are not objectively harmful is not a *genuine* concern, on my account, as we indeed ought to take subjective perceptions of harm seriously. I have, furthermore, mentioned some practical ways in which this may be qualified, practically.

4.4 Concluding remarks

This chapter has examined two policy arguments against the wrongful life action. The first policy argument which was examined is the argument that the wrongful life action is unfairly discriminatory towards disabled persons. More particularly, I

considered, firstly whether the wrongful life action expresses a message that disabled lives are not worthwhile. Here, I argued that that disability is identity constituting and that the wrongful life action therefore may very well express such a message. However, and secondly, I tried to show that the wrongful life action does not have the capacity to perpetuate or increase discrimination against disabled persons. Instead, I tried to show that the wrongful life action could be viewed as an ethical tool which addresses the social inequality and discrimination experienced by disabled persons. That is, that compensating disabled persons who take their disabilities to be harmful can be viewed as a form of positive accommodation which recognises their particularity and difference and thereby their worth and dignity.

The second policy argument which this chapter examined is the argument that the wrongful life claim would lead to a slippery slope, and more specifically, that it would be used by children who feel harmed by their existences to claim against their parents. In addressing this argument, we started with an examination of the right to procreative autonomy and ultimately concluded that this right is not absolute, in that there exist sophisticated moral principles – such as procreative responsibility and procreative beneficence – which should guide our procreative endeavours. We then looked at the claim that perhaps all procreation is harmful, and not just procreation whereby parents do not take into account the welfare of the children who will result. In this context, however, we found that if harm is necessarily subjective in nature, then this cannot be true. That is, the 'harmful' aspects of existence (which those such as Benatar argue to befall each and every one of us in coming into existence) are not necessarily harmful. In other words, it is only if the particular person who exists experiences their existence as harmful, that existence could be harmful for that person. This also implies, by the same token, that we should take *all* harm claims seriously, even if they do not fall within the ambit of what is commonly or objectively taken to be harmful. I therefore conclude that the policy arguments considered do not necessarily undermine the ethical desirability of the wrongful life action.

Conclusion

This thesis has examined the wrongful life delictual action. It was shown that the action is both legally and morally controversial, primarily because of the fact that the wrongful life plaintiff's harm is not easily accommodated within our existing delictual law paradigm. In Chapter 2, however, it was shown that the existing account of harm that the delictual law paradigm adopts is actually a problematic account of harm by virtue of the fact that it does not accommodate our intuitions regarding which things are harmful and which are not. It was shown that the counterfactual comparative account of harm leads to the wrong results in cases of pre-emptive harms; omissions and failures to benefit; and in the case of future persons whose existences are tied to our acts. I tried to show that non-comparative notions of harm can account for what is intuitively harmful about harm more satisfactorily than comparative accounts can. I also tried to show that Shiffrin's account is the best account we have on offer because it is unified and has good explanatory power.

Echoing Shiffrin's account of harm, I tried to show that what is harmful about harm is that it causes a subjective usurping of one's will. I also tried to show that this need not be immediate and that it can occur after the fact. Therefore, even though the wrongful life plaintiff was not a person with a will at the time at which the medical practitioner acts (because he or she was in utero), once he or she is older and has a more developed will, and once the subjective effects of his or her disability can be appreciated, he or she can be said to be harmed. The harm paradox within the wrongful life action therefore resolves itself, and in light of this, the wrongful life action becomes necessary to redress or rectify the harm which may be experienced by the wrongful life plaintiff.

Turning to the discussion on disability in Chapter 3, however, I tried to show that disability is not necessarily or inherently harmful, and that whether a particular disability could be considered harmful depends upon a complex interaction between biological impairment, the social environment in which the disabled person finds him or herself, as well as, and most importantly, the disabled person's subjective experience of the disability. I also tried to show that in light of this, it is of the utmost normative and ethical importance to accept disabled persons' own experiences of

their disabilities. Because of this, and in order to protect the integrity of the wrongful life action, it should only be available to persons who experience their disability as a harm, and this harm should be voiced from within the disabled community. This naturally leaves out disabled persons who are severely intellectually disabled such that they cannot communicate their wills. The discussion in Chapter 3, however, shows that this is a necessary limitation. When able-bodied persons transpose able-bodied, medicalised understandings of disability onto the disabled experience of disabled persons, it may be a form of harm in and of itself. It is, therefore, of the utmost normative importance that we guard against this. There is furthermore no reliable way, in any event, to ascertain whether a disabled person who cannot communicate experiences their particular disability as a harm. Notwithstanding this, however, the wrongful birth action would still be available to parents of disabled children who cannot communicate that they feel harmed by their disabilities. Moreover, society ought to provide better positive accommodation for those with disabilities, which may attenuate the possible harms which they experience as a result of their disabilities but which they cannot communicate.

This thesis also tried to show that the wrongful life action passes muster against two important policy arguments. The first policy argument is that the action may discriminate against disabled persons by perpetuating the social inequality experienced by disabled persons. I tried to show, on the contrary, that the wrongful life action, by providing very necessary monetary compensation, can have the effect that it actually affirms the dignity of disabled persons and becomes a means of positive accommodation in and of itself. This is because the monetary award has the effect that it recognises the difference and particularity of the disabled person, as a person with unique particular needs. We also saw that this can even be conceptualised as the fulfilment of a socio-economic right.

We then turned towards the second argument from policy; that is, the generally accepted view that if the wrongful life action is permitted, it should only be available to persons who are born into a disabled state due to the negligence of a medical practitioner and not also to persons who are born into unsuitable or inhospitable conditions as a result of their parents' choices. In this regard, however, I tried to emphasise that procreative autonomy on the part of parents is not absolute, and that

procreation always carries at least the *risk* of harm. This is because unconsented to harms can never be attenuated by the fact that procreation also imposes benefits on children because, following Shiffrin, unconsented to harms are only morally permissible if they are intended to alleviate greater harms. Procreation does not have this effect. Because of the subjective nature of harm, however, procreation cannot be said to be inherently immoral, as it is only immoral should a person result who feels harmed by his or her existence. In this way, procreation only *risks* harm. We are also obligated to take these claims seriously, as I have argued.

As a last note, it should be kept in mind that the arguments made in this thesis have largely been in service of refuting the moral or ethical argument against the wrongful life action. This argument entails that allowing a wrongful life claim would be analogous to holding a rescuer liable for injuries that they caused to an endangered person whilst rescuing him or her. I have tried to show that this argument fails because it gives little to no recognition to the subjective nature of harm, in that what is harmful about harm is not that it renders a person objectively worse off, but rather that it produces a condition which conflicts with his or her will, and thereby a harmful condition. It might be argued, in response, that even though this might make sense from a moral or ethical point of view, it would not translate well into legal practice. More specifically, if harm is both subjective as well as non-comparative in nature, then judges who have to adjudicate these things may have a difficult task in calculating damages in that there is no objective point of reference to work from. In response to this concern, I would like to make the following three brief remarks.

Firstly, this concern speaks to a much larger philosophical problem regarding the relationship between morality and the law, a concern which I have not attempted to address here. My project merely serves to draw attention to the fact that there is a problematic deviation between the way that harm is conceptualised and applied within the legal sphere, and the way that our intuitions surrounding harmfulness work.. Addressing or remedying this deviation, however, is not part of the scope of this thesis, although it may be a particularly interesting area for future research.

Secondly, it bears mention that there are many instances within delictual law where the harm enquiry is largely centred on subjective harm in any event. To mention just

a few and to echo the remarks of DCJ Moseneke in *Van der Merwe v Road Accident Fund*,[79] there are many causes of action that are based on infringements of rights where the very infringement is a subjective infringement, and, we could therefore argue, a subjective harm. The examples of infringements of dignity, reputation, identity and privacy for instance make this clear. In these instances, the harm which is suffered by the plaintiff is largely subjective. For example, what one person may experience as an infringement upon their dignity, another person might not experience as an infringement upon their dignity. The same can be said in the context of reputation, identity and privacy. [80] Courts, however, award damages in all of these instances.

Besides these personality infringements, however, courts have also awarded damages for instances of chronic pain where there is no accompanying objective or overt physical complication. The causal enquiry, in this instance, becomes more of a credibility enquiry in that the court is tasked with deciding whether the plaintiff, based on his or her own evidence and testimony as well as on his or her evidence given in cross-examination, has made a convincing claim. If the plaintiff is found to be credible, then the court accepts his or her subjective evidence of the chronic pain as fact and awards damages. The credibility of the plaintiff's claims, moreover, can often be reinforced by corroborating evidence given by mental health practitioners and by friends and family who are close to the plaintiff.

Lastly, I would like to mention one particular delictual case in which the subjective nature of harm was not only acknowledged but where a previous damages award was actually reduced in light of the fact that a large portion of the plaintiff's harm was not subjectively experienced. This is the case of *Sigournay v Gillbanks*.[81] In this case, the plaintiff was severely injured in a motor vehicle accident. The plaintiff's

[79] Paragraphs 39-41.
[80] A trivial but very real example of this is found in the different ways that the morality of sexual activity is treated by men by women. A young woman who is labelled a 'slut' at school may take this to be an infringement of her dignity and reputation. She may also deem it an infringement of her privacy that some of her closest friends have revealed some of the details of her intimate sexual life to outsiders. In contrast, a young man, who has the exact same amount of sexual partners as the young woman described earlier, would probably take being labelled a 'man slut' as something praiseworthy, something which would increase his popularity and better his reputation.
[81] 1960 (2) SA 552 (A).

injuries included an injury to the eye, the collar bone, the ribs and a brain injury.[82] The plaintiff claimed damages under a variety of heads, one of them being pain and suffering, and was awarded a large sum of damages in the trial court under this head. On appeal, however, one of the issues was whether the plaintiff was awarded too large an amount of money by the trial court for pain and suffering. The appeal court was concerned with the fact that a large portion of the pain which the plaintiff had suffered was not consciously or subjectively experienced in light of the fact that he was in a coma for a substantial period of time. On appeal, the majority ruled that "most of what might have been excruciating pain was not pain for the plaintiff"[83] and that the award in respect of pain and suffering should therefore be reduced to reflect the pain and suffering that he *subjectively* experienced.

The point of the above remarks is to note that the concept of general damages within delictual law is largely based on subjective experience in any event. In light of this, how to conceptualise legal harm as subjective harm becomes less of a challenge than it may initially seem, although the intricacies of how this might work would need to be properly fleshed out.

As a final note, it may be interesting to note what future areas of research are opened up by the arguments made in this thesis. I would like to conclude this thesis by mentioning just two. Firstly, I noted a few times that whether the negligent medical practitioner causes the disabled child harm would become a matter of moral luck. I also noted that whether parents can be said to harm their child, by their act of procreation, is also a matter of moral luck. This is because at the precise time that the medical practitioner or the parents act, there is no child with a will which can be usurped. The will develops later, and it is at this point in time that harm may or may not set in. It may be interesting to investigate what implications this might hold for our concept of harm in general and especially so in relation to the blameworthiness or accountability aspect of harm. I mentioned earlier that this thesis was not concerned with the accountability or blameworthiness aspect, but it may be interesting to analyse what implications moral luck could have in that context. For example, if certain acts or events only *risk* harm, are they less blameworthy?

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[82] Page 554 at H.
[83] Page 571 at E.

Secondly, my argument seems to problematise the generally accepted view of or relationship between harm and non-benefits. That is, if harms are the sorts of things that result in the alienation of a person from his or her will, then failures to benefit seem to qualify as harms as well. That is, because failing to receive a benefit could also conflict with or alienate a person from his or her will. If there is no moral difference between actively causing a subjective usurping of the will and inactively or indirectly allowing a subjective usurping of the will to come about (i.e. failing to benefit) then it seems to imply that failures to benefit should be taken seriously by moral agents. I noted earlier that this may have interesting implications in the context of, for example, human enhancement, but it would be interesting to consider what further implications this might hold in other contexts or for our conception of harm in general.

Lastly, it bears mention that accepting the account of harm developed in this thesis might imply that only *certain kinds of beings* could be harmed - being autonomous beings that have wills, and are able to express those wills, or who are at least capable of developing a will which can be expressed (and can then be retroactively harmed). There may be an argument to make that my account of harm, therefore, violates what Bradley termed 'ontological neutrality' because in conceptualising harm in the way that I have, many sorts of beings may be excluded as victims of harm (2012: 400). I mentioned, and accepted, in Chapter 2 for example, that my account of harm entails that those who are unable to ever develop an autonomous will can never be harmed, and thereby excluded persons who are severely intellectually disabled to the point where they cannot communicate from the ambit of the wrongful life remedy. I tried to show, however, that this was a necessary limitation in order to protect the integrity of the wrongful life action and save it from the charge that it presupposes that *all* disabled lives are miserable lives.

A particularly interesting question which arises, in light of my qualification that harm needs to be subjectively experienced and capable of expression, is whether animals can be harmed. Rabenberg (2015: 3), for instance, says that a subjective account of harm would exclude animals from the ambit of harm. Bradley (2012: 395), furthermore, says that "an analysis that entails that dogs ... cannot be harmed must be false." I share Bradley's sentiment and have remained conscious of it throughout

the writing of this thesis, although not having explicitly addressed it anywhere.[84] In concluding this thesis, I would like to make two very tentative suggestions as to how this sentiment may be incorporated into a subjective account of harm.

Firstly, it could be argued that different kinds of beings are harmed in *different ways*, and thereby accept that there are, in fact, ontological differences in our concept of harm. Shiffrin (2012: 359), for instance, briefly touches on this in stating the following:

> Harm', I freely concede, has a diverse range of ordinary language applications. Probably no account could comfortably and meaningfully accommodate all these uses. 'Harm' can be used to signify damage pure and simple ... we may that a plant is harmed when its leaves are stripped or *an insect is harmed when its antennae are torn; here we point to an extended sort of damage or interruption of life function*. *I do not mean to address these sorts of harm. Rather, I mean to try to isolate a core notion of ahrm to individuals that justifiably occupies a prominent place in normative theory*. (own emphasis)

Shiffrin, therefore, seems to accept that only human beings are the subjects of the account of harm which she develops. Plants, as well as animals, however, may be harmed in other ways that are not based on any notion of a usurpation of a conscious subject's will. I am unsure, at this stage, whether I agree with this, but my hesitation also seems to beg the question of why it is necessary that human beings and animals, or plants, must share the same sense of harm or experience/suffer harm in the same way.

Secondly, and lastly, if we accept that harm must be universal and ontologically neutral, there may be ways in which to incorporate plants and animals into the account of harm developed in this thesis. On the one hand, we could accept that plants and animals do have wills, in the same way that we do. Another way in which to conceptualise this, is to say that our 'wills' are not uniquely human and are, rather, developed on the back of universal survival mechanisms, shared by all things which

[84] This is also an especially personal sentiment for me – I have been a vegetarian for seven years, on the basis of the belief that rearing animals for the sole purpose of human consumption causes them harm, and that eating animals is therefore morally impermissible.

are ‘alive’. This is probably more acceptable in the case of animals, who very clearly show fear, pain and anguish in response to certain stimuli and harmful acts, in the same ways that human beings do, which can be seen as expressions of the fact that the event taking place is not one which is welcomed or wanted. The same argument can be made in the context of plants, but it is less strong. To mention one example, there have been reports that trees are able to slightly adjust their physical position and rotate their branches in service of moving as far as possible (microscopically from our perspective of course) from deforesters. Again, this can possibly be seen as an expression of a will against being cut down and having to encounter death, which is of course a universal harm to all living beings, unless welcomed (as I have argued).

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